Petition

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No. _____

In The

Supreme Court of the United States

October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Judicial Immunity Bars the Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988 Against a Member of the Judiciary Acting in His Judicial Capacity.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Gladys Pulliam, Magistrate for the County of Culpeper, Virginia, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

I.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is not reported and is included herein as Appendix A. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued September 22, 1982, is reported at *Allen v. Burke*, 690 F.2d 376 (4th Cir. 1982.)

II.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1982. Petitioner filed a Petition for Rehearing *en banc* which was denied on November 29, 1982 although four judges voted in favor of the rehearing *en banc*. The jurisdiction of this Court to issue a writ of certiorari in this case is grounded on 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1988, as amended by the Civil Rights Attorney's Fees Award Act of 1976 (Act), 90 Stat. 2641, provides, in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

IV.

STATEMENT OF THE CASE

Petitioner, a Magistrate in the County of Culpeper, Virginia, was one of two defendants[1] in an action instituted in the United States District Court for the Eastern District of Virginia pursuant to the provisions of 42 U.S.C. § 1983. Plaintiffs sought monetary damages and injunctive and declaratory relief. Plaintiffs attacked implementation of

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[1] This action was dismissed as to the other defendant in the trial court.

several statutory provisions relating to pretrial arrest and detention of intoxicated persons. The District Court granted injunctive relief. While recognizing that the doctrine of judicial immunity prevented an award of money damages against petitioner, the District Court nevertheless directed that, pursuant to 42 U.S.C. § 1988, petitioner pay an attorney's fee to plaintiffs in the amount of approximately $7,500.

Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit on the ground that she, as a judicial officer, was immune from the payment of an attorney's fee in a civil rights action under 42 U.S.C. § 1983, 1988.[2] The Court of Appeals held the petitioner was not immune from the payment of the attorney's fee in an action in which prospective relief is properly awarded and refused to disturb its holding when a rehearing was requested.

V.

REASONS FOR GRANTING THE WRIT

A.

IMMUNITY OF A JUDICIAL OFFICER FROM THE PAYMENT OF AN ATTORNEY'S FEE AWARD UNDER 42 U.S.C. § 1988 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

In 1980, this Court, while acknowledging an apparent division among circuits on the application of judicial

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[2] Petitioner also appealed on other grounds which are not being pursued in this Court.

immunity[3] in suits involving declaratory or injunctive relief, indicated a belief that "the question of awarding attorney's fees against judges will not often arise." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735 n.13 (1980). Regrettably, this Court's prediction has not been borne out in practice. Since 1980, the Fourth, Third and Seventh Circuits have sanctioned such awards while some district courts in other circuits would not allow such awards. A recent survey undertaken by the National Center for State Courts' Research and Information Service showed that in 1981, more than 600 actions were initiated against judges or court personnel in the 46 states and territories participating in the survey. Ito, "A National Survey Shows Wide Variations in Actions Against Court Personnel," 6 STATE COURT JOURNAL, No. 3 at 9 (Summer 1982). The disposition of most of these cases is as yet unknown. But the numbers alone attest to the need for resolution of the questions surrounding the meaning of judicial immunity. One of these questions, an award of attorney's fees under 42 U.S.C. § 1988, can be resolved by this Court in this case.

The doctrine of judicial immunity was clearly set out in 1869 in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523. It is based upon the long-standing principle that the proper administration of justice requires a "judicial officer, in exercising the authority vested in him, be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. (13

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[3] The Commonwealth of Virginia has approved the doctrine of judicial immunity, *Bellamy v. Gates and Gill*, 214 Va. 314, 200 S.E.2d 533 (1973), and has specifically held that magistrates are immune from liability in suits for money damages, *Berry v. Smith*, 148 Va. 424, 139 S.E. 252 (1927).

Wall.) 335, 347 (1872). *See also Stump v. Sparkman*, 435 U.S. 349 (1978). This principle was reaffirmed by this Court as recently as last year in *Nixon v. Fitzgerald*, _____ U.S. _____, 73 L.Ed.2d 349, 361 (1982). The extent to which and circumstances in which judicial immunity applies, particularly as it relates to the payment of attorney's fees, still remain largely unresolved.

In the absence of clear direction from this Court, lower courts have been hampered in their examination of the legality or propriety of an award of attorney's fees against a member of the judiciary. The Court of Appeals for the Fourth Circuit in this case specifically acknowledged that this Court has never decided the scope of judicial immunity in relation to granting prospective relief and subsequent attorney's fees. *Allen v. Burke*, 690 F.2d 376, 378, n.7. Yet the lower court, holding that prospective relief was not prohibited by judicial immunity, automatically assumed that 42 U.S.C. § 1988 authorized attorney's fees. While the lower court reviewed the history of § 1988, it failed to examine the history of judicial immunity. Similarly, the Third Circuit Court of Appeals in *Morrison v. Ayoob*, 627 F.2d 699 (3rd Cir. 1980), assumed, without deciding, that injunctive and declaratory relief was not barred by judicial immunity, and, on that basis alone, awarded attorney's fees against a judicial officer. The Seventh Circuit in *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), followed the same path and reached the same conclusion. Conversely, other courts have refused to grant this type of relief. *See Baier v. Parker*, 523 F.Supp. 288 (M.D. La. 1981); *N.A.A.C.P. v. State of California*, 511 F.Supp. 1244 (E.D. Cal. 1981).

Petitioner believes the reasoning and conclusions of

the Fourth, Third and Seventh Circuits are wrong in light of the policy underlying judicial immunity.

Consideration of this petition and reexamination of the lower court's opinion are further warranted given this Court's very recent pronouncements in *Nixon v. Fitzgerald, supra.* Although that case dealt with the type of immunity available to the President of the United States, this Court unequivocally reaffirmed the doctrine of judicial immunity.

> Similarly, the decision in *Pierson v. Ray*, 386 U.S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'"
> . . . [E]specially sensitive duties of certain officials —notably judges and prosecutors—required the continued recognition of absolute immunity. . . . *Stump v. Sparkman*, 435 U.S. 349 (1978) (state judge possessed absolute immunity for all judicial acts).
>
> . . . .
>
> As is the case with prosecutors and judges—for whom absolute immunity is now established—a President must concern himself with matters likely to "arouse the most intense feeling." *Pierson v. Ray, supra*, 386 U.S. at 554.

Nixon v. Fitzgerald, supra, at 361, 365. The language of this Court, speaking of judicial immunity in *absolute terms,* brings into question the propriety and legality of

an award of attorney's fees under 42 U.S.C. § 1988 against a member of the judiciary acting in his judicial capacity—a question which should be answered by this Court.

B.

THE DOCTRINE OF JUDICIAL IMMUNITY IS INCONSISTENT WITH AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

A close examination of the doctrine of judicial immunity compels the conclusion that an award of attorney's fees against a member of the judiciary acting in his judicial capacity cannot be sustained. The doctrine exists "for the benefit of the public whose interest it is that judges should be at liberty to exercise their function with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The doctrine affords a judge the ability to act without fear of "personal consequences to himself," *Stump v. Sparkman*, *supra*, at 355, in areas of "especially sensitive duties," *Nixon v. Fitzgerald*, *supra*, at 361.

The benefit to society resulting from this policy has led the Court to state on more than one occasion that members of the judiciary "defending against § 1983 actions enjoy absolute immunity from damage liability for acts performed in their judicial capacity." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-35 (1980); *Pierson v. Ray*, *supra*; *Stump v. Sparkman*, *supra*. No one can dispute that a judge, knowing he could be subject to payment of a damage award, may feel constrained in the actions he takes. The chilling effect on the judiciary is no less chilling when the monetary award is called attorney's fees. The personal consequences are no

different; if anything, the consequences of an award of attorney's fees may be greater. The complex and massive § 1983 litigation entertained in our courts today often and easily includes attorney's fees awards of substantial proportions. The threat of such an award against a member of the judiciary has the same impact and can occur more often than a damage award. The label attached to the payment of the money is inconsequential. *Edelman v. Jordan*, 415 U.S. 651 (1974).

The provisions of 42 U.S.C. § 1988 do not compel a different result. By its terms, the attorney's fee award is discretionary, not mandatory. This statute, as any other statute in derogation of common law, should be strictly construed. There is no direct indication in the statute itself, or in its legislative history, that Congress intended to abrogate judicial immunity and allow attorney's fee awards. Some clear intention to overturn a policy dating back to 1869, should be required before the very evil sought to be avoided through the development of the doctrine of judicial immunity is allowed to hover over members of the judiciary.

VI.

CONCLUSION

Judicial officers should not be required to perform their duties under an uncertain cloud of liability. Petitioner urges this Court to grant the writ of certiorari, reverse the judgment of the court below and sustain the principle of absolute judicial immunity from an award of attorney's fees under 42 U.S.C. § 1988.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHMOND R. ALLEN
and
JESSE W. NICHOLSON,
Plaintiffs CIVIL ACTION NO. 81-0040A

v.

BASIL C. BURKE, JR., Judge
of the General District
Court for the County of
Culpeper, Virginia, *et al.*,
Defendants

ORDER

Entered June 4, 1981

In accordance with Memorandum Opinion this day filed, it is hereby ORDERED and DECLARED that:

1. To the extent that Va. Code § 19.2-74 and § 19.2-74.1 authorize the incarceration of persons charged with misdemeanors for which no jail time is authorized, solely because they cannot meet bond, those sections are unconstitutional and void. Any pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger persists and must cease when the condition which created the danger changes or abates, or arrangements are made for release of the person into third-party

custody under circumstances which abate the danger.

2. The provisions of Va. Code § 19.2-74 and § 19.2-74.1 which authorize pretrial detention for a person charged with violating Va. Code § 19.2-388 if he is deemed likely to disregard a summons, violates the equal protection clause of the Fourteenth Amendment and is void, as long as Va. Code § 19.2-74.1 exempts all other Class 3 and Class 4 misdemeanors from similar restriction.

3. The practice and course of conduct in Culpeper County, Virginia, under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond is unconstitutional and is hereby enjoined. In particular, any such conduct or practice by defendant Gladys Pulliam, magistrate, is declared unconstitutional, and she, and those carrying out such practices, are enjoined from such practices.

4. Defendant Judge Basil C. Burke, Jr., is dismissed from this action.

5. Summary judgment is granted to plaintiffs against the remaining defendant.

6. Plaintiffs, having substantially prevailed in this cause, are entitled to costs, including reasonable attorney fees, in accordance with 42 U.S.C. § 1988. Plaintiffs' counsel are directed to submit a request for costs to defendant within ten (10) days. If defendant disagrees with the request she is directed to state the reasons for disagreement to the court within ten (10) days after having received plaintiffs' request.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia

MEMORANDUM OPINION

Plaintiffs challenge the constitutionality of the Virginia state law[1] and local practice in Culpeper under which pretrial detainees are held in jail pending a trial, solely because they are unable to meet bail, on charges for which no incarceration is authorized and the maximum punishment is a fine. Plaintiffs, two arrestees who served time in jail because they were unable to post bond on Class 3 and Class 4 misdemeanors,[2] seek declaratory and injunctive relief against the judge of the General District Court and the magistrate of Culpeper County, Virginia. The action is brought under 42 U.S.C. § 1983, and jurisdiction is founded on 28 U.S.C. § 1343(3).

The matter is before the court on plaintiffs' motion for summary judgment, on which a hearing was had on May 29, 1981. The parties have entered into a *Stipulation of Facts*, which, together with exhibits contain all the material facts necessary to render summary judgment. The parties do not disagree on material facts.

The plaintiffs assert violation of the Eighth, Fourteenth and Sixth Amendment rights. Because the court finds the Fourteenth Amendment due process and equal protection claims dispositive, the other grounds will not be discussed.

The Stipulation of Facts and other uncontested facts revealed by the record and the arguments of counsel indicate that plaintiff Allen was arrested on January 10, 1980, on a Class 3 misdemeanor charge (Va. Code § 18.2-416, abusive and insulting language). Bond was set by de-

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[1] Va. Code §§ 19.2-74 and 19.2-74.1.

[2] Maximum penalty for Class 3 and Class 4 misdemeanors is $500 and $100, respectively. Va. Code § 18.2-11 (1975 Repl. Vol.).

fendant magistrate Gladys Pulliam at $250 which Allen was unable to meet. He was held in jail solely because of his inability to meet bail for fourteen days until January 24, 1980, on which date he was tried by defendant Judge Burke, found guilty,[3] and released.

Plaintiff Nicholson was arrested on four occasions in Culpeper for violation of the Class 4 misdemeanor, drunk in public, Va. Code § 18.2-388. A $30 cash bond was required of Nicholson in connection with his arrests on December 26, 1980, December 30, 1980, January 16, 1981, and February 24, 1981. When he was unable to pay the bond, ordered on at least one occasion by magistrate Pulliam, he was committed to jail to await trial and was incarcerated for two days after the arrest on December 26, 1980, for four days after the arrest on December 30, 1980, for six days on January 16, 1981, and for two days on February 24, 1981.

The practice of requiring bail for Class 3 and Class 4 misdemeanors is not an isolated practice in Culpeper County. *Stipulation of Fact* 29 states: "Defendant Pulliam on many occasions requires a cash bond of $30.00 for a person arrested for a Class 4 misdemeanor, and, if the bond be not met, she commits such person to jail awaiting trial."

Stipulation No. 30 states: "Defendant Pulliam does also on occasion require a cash bond of $100.00 for violation of a Class 3 misdemeanor and, if such bond be not met, she commits such person to jail awaiting trial."

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[3] Judge Burke subsequently reopened the judgment and found Nicholson not guilty.

Stipulation No. 31 states: "Between September 30, 1980 and February 27, 1981, at least forty-nine (49) persons have been arrested for alleged violation of a class 3 or class 4 misdemeanor in connection with which a cash bond was required."

Stipulation No. 32 states: "Between September 30, 1980, and February 26, 1981, a least thirty-four (34) persons have been incarcerated for at least one day or night awaiting trial for alleged violation of a class 3 or class 4 misdemeanor."

While the *Stipulation of Facts* makes it clear that plaintiffs were held in jail solely because of their inability to make bail, counsel for the Commonwealth of Virginia indicated at the hearing on May 29, 1981, that the position of Attorney General is that those persons arrested for drunk in public, Va. Code § 18.2-388, who are held under the provisions of § 19.2-74 which authorizes the holding of any misdemeanant who is "likely to cause harm to himself or to any other person" should be held only for so long as he is a danger to himself or others and not necessarily until trial. The Assistant Attorney General also indicated that further interpretation of relevant state law might be forthcoming from the Office of the Attorney General. However, in view of the scheduled trial date for this matter on June 16, 1981, the court does not believe it can further delay ruling on the motion for summary judgment and will proceed on this matter on the basis of the record and legal position already advanced.

Defendants take the position that there is no constitutional right to be free from incarceration pending trial for a non-incarcerable offense if the detainee cannot meet bond. *See, Defendants' Memorandum in Support of Mo-*

tion to Dismiss,¶ 2. Defendants' support for this proposition is, quite frankly, anemic. Of the four cases cited, only a 1896 case from the Texas Court of Criminal Appeals, *Ex Parte Ferrell*, 37 S.W. 328 (1896), is remotely on point. This one paragraph opinion upholds the incarceration of a defendant on a fornication charge after he was unable to post the $150 bail. No constitutional issues were addressed; nor was it clear from the opinion whether the offense carried a jail time.[4]

This court believes there is a constitutional right not to be jailed solely for failure to make bond on an offense for which no incarceration is authorized by the state. It offends basic notions of fairness to subject a pretrial detainee, clothed with the presumption of innocence, to a greater punishment than he could receive after being found guilty, solely because of inability to pay a money bond. The liberty interest at stake here is an important one. Freedom from bodily restraint and punishment without due process by the state is one of the more basic guarantees of the constitution. *Ingraham v. Wright*, 430 U.S. 651 (1977). One has, beyond doubt, " a substantial liberty interest in not being confined unnecessarily." *Parham v. J.R.*, 442 U.S. 485, 600 (1979).

The challenged practice also violates principles of equal protection. In *Williams v. Illinois*, 399 U.S. 235 (1970), the Supreme Court held unconstitutional an Illi-

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[4] The other cases cited in defendants' constitutional argument are *People v. Scott*, 71 Misc. 2d 266, 335 N.Y.S. 2d 659 (1972); *Webber v. State*, 239 P. 566 (Okla. 1925); and *Connecticut v. McCoy*, 4 Conn. Cir. 109, 226 A. 2d 116 (1966). None of these cases address the constitutionality of detaining persons awaiting trial for crimes for which the maximum punishment does not include confinement.

nois statute which permitted imprisonment beyond the maximum fixed by statute when the additional incarceration resulted directly from involuntary nonpayment of a fine or court costs. The Court held that "the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense to be the same for all defendants irrespective of their economic status." 399 U.S. at 244. This decision invalidated statutes in each of the fifty states, including Virginia,[5] which allowed to one degree or another the state to incarcerate a defendant to work off a fine or court cost he was unable to pay.

The principle of the *Williams* case was extended by the Supreme Court in *Tate v. Short*, 401 U.S. 396 (1971), where the Court held unconstitutional a Texas statute which required that persons convicted of traffic offenses for which only fines were assessable could be nevertheless incarcerated for sufficient time to satisfy the fines at the rate of $5 a day. Imprisonment solely for indigency was held unconstitutional. 401 U.S. at 398.

Although both *Williams* and *Tate* deal with incarceration due to indigency after conviction, the principle applies with even greater force to pretrial detainees who are presumed innocent and who suffer before any trial a punishment unauthorized even after a determination of guilt.

The Commonwealth argues that the complaint of plaintiff Richmond Allen, who was held for fourteen days awaiting trial on a Class 3 misdemeanor has been mooted by the subsequent enactment of Va. Code § 19.2-74.1

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[5] Repealed Va. Code § 19.1-399 (Supp. 1968) provided: "The circuit or corporation court in which any judgment for a fine is rendered may commit the defendant to jail until the fine is paid."

(1980 Cumm. Supp.),[6] which prohibits the retention in custody of any person arrested for a misdemeanor for which he cannot receive a jail sentence except for those arrested under the provisions of Va. Code § 18.2-388, profane swearing or drunk in public.

Since Allen was arrested for and charged with a violation of Va. Code § 18.2-416, abusive and insulting language, he could not lawfully be held in pretrial confinement under the terms of § 19.2-74.1. However, despite the disclaimer of the Assistant Commonwealth Attorney [*sic*] at the hearing, the record indicates that the magistrate in Culpeper continues to impose bail for those charged with Class 3 and Class 4 misdemeanors not limited to § 18.2-388, and if such bond is not met, commits such person to jail awaiting trial. *See, Stipulation of Facts* No. 30.

Va. Code § 19.2-74.1 excludes by its terms plaintiff Nicholson who was arrested for violating § 18.2-388, drunk

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[6] Va. Code § 19.2-74.1 provides:

A. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city or town ordinance or of any provision of this code punishable as a misdemeanor for which he cannot receive a jail sentence, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.

Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of chapter 23 (§ 19.2-387 et seq) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390.

B. The provisions of this section shall not be applicable to any detention or arrest made under the provisions of § 19.2-388. (1980, c. 344).

in public. His pretrial detention is thus governed under the state statutory scheme by § 19.2-74 which provides generally that a person arrested for any misdemeanor, whether punishable by jail or not, should be issued a summons and not held in custody, but provides for exceptions in the case of "any person believed by the arresting officer to be likely to disregard a summons" or "if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person or is charged with commiting any violation of § 18.2-407 [remaining at place of riot or unlawful assembly after warning to disperse, a Class 3 misdemeanor]. . . ."[7] For any arrestee deemed to fall into the exceptions in § 19.2-74 the arresting officer is authorized to take the person to a judicial officer who shall determine whether probable cause exists to place the person under an exception. The magistrate may then issue an arrest warrant on which bond could be set and incarceration could result if that bond were not met.[8]

Thus, under the Virginia law any person arrested under § 18.2-388, which includes not only drunk in public but also "profane swearing," if deemed likely either to disregard a summons or to be a danger to himself or others, could be incarcerated pending trial if he is not able to meet bond. As noted previously, *supra* p. 3, the Assistant Attorney General conceded at the hearing that to the extent that these statutes authorize pretrial detention for a public drunk who is deemed to be a harm to himself or

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[7] The court makes no specific findings as to this provision since it is unrelated to the issues in this case.

[8] The magistrate's power to issue arrest warrants and to set bail is found at Va. Code § 19.2-20, § 19.2-45(3) and § 19.2-123. Va.

others to continue for longer than that condition persists and beyond the time when the drunk has sobered, they are invalid. However, the statutes do not so state, and this qualification was not applied with respect to plaintiff Nicholson who was held for periods up to six days, long after he could be presumed to have become sober.

The court is sympathetic to the dilemma of the defendant magistrate who is confronted with a person arrested for public drunkenness and whose immediate release would create danger to the arrestee or to others. However, neither the statute nor the practice in Culpeper appears to be based on such concerns. Nicholson was detained solely because he could not meet the bond, and for periods up to six days.

The Virginia statutes and the practices in Culpeper which allow pretrial detention of those arrested for crimes for which no jail time is authorized, solely because of inability to meet bail, are unconstitutional. This unconstitutionality specifically includes the provisions for drunks arrested pursuant to § 18.2-388 which places no limitation on the pretrial detention after the condition which poses danger to the arrestee or to others has terminated. The statutory scheme is also unconstitutional with respect to those arrested under § 18.2-388 for whom pretrial detention is authorized under § 19.2-74 if it is deemed they are likely to disregard a summons.

Va. Code § 19.2-74.1 indicates that for all other mis-

Code § 19.2-74.1 does not in terms refer to the power of magistrates but only to the duties of officers. This section must be read in conjunction with § 19.2-74 and the sections authorizing magistrates to require bond to complete the legislative scheme for the treatment of pretrial arrestees.

demeanants, for whom no jail time is authorized, the state interest in securing the defendant's presence at trial is not so great as to justify the posting of bond or incarceration in lieu of bond. In other words, the legislature has by § 19.2-74.1 said that even if Class 3 and 4 offenders other than § 388 offenders are not likely to appear in response to a summons, the state is willing to accept this risk and possible loss of fine. The defendants offer no rationale for the distinction between § 388 offenders and all other Class 3 and 4 misdemeanants. The court considers this distinction created between § 388 misdemeanors and other misdemeanors for which no jail time is authorized to be irrational and to violate the Equal Protection Clause of the Fourteenth Amendment.

Appropriate declaratory and injunctive relief will be ordered in accordance with an order to be issued contemporaneously with this Memorandum Opionion.

It appears from the record that defendant Judge Burke's involvement in the unconstitutional laws and practices is minimal or non-existent. As District Judge he played no direct role in the pretrial detention of either plaintiff and was first aware of them and their detention only when they appeared before him for trial. Accordingly Judge Burke will be dismissed from the action. Summary judgment as to the remaining defendant is granted to plaintiffs.

The plaintiffs, having substantially prevailed, are entitled to costs, including reasonable attorney fees, in accordance with 42 U.S.C. § 1988.

/s/ Albert V. Bryan, Jr.
United States District Judge

APPENDIX B

ORDER

Entered July 6, 1981

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the following attorney's fees and disbursements are allowed as costs in this action and are awarded against the defendant Gladys Pulliam, Magistrate for the County of Culpeper, Virginia:

Attorney's fees	$7,308.00
Costs	383.09
Total	$7,691.09

/s/ Albert V. Bryan, Jr.
United States District Judge

MEMORANDUM OPINION

This action is again before the court on plaintiff's request for an award of costs, including attorney's fees, pursuant to 42 U.S.C. § 1988 and as directed by the court in its June 4, 1981 order.

The request is for $7,308.00 in attorney's fees and $383.09 in disbursed costs. The disbursed costs are not objected to, except for one trip to Alexandria, and they will be allowed, including that item. The attorney's fee is objected to as being calculated at a rate of $60.00 per hour instead of $40.00 per hour, the latter figure being defendants' assertion of what is reasonable. The number of hours expended by plaintiffs' counsel are not contested or deemed unreasonable by defendants except, again, for

six hours expended for a trip to Alexandria to obtain an *in forma pauperis* order and to file the suit. Defendants assert that this could have been accomplished by mail, and that is probably correct. However it is not unreasonable for counsel to want the first contact with the court to be in person, to answer on the spot any questions the clerk might have, to correct any mechanical deficiences in the filing immediately, and to get permission to file *in forma pauperis* and the filing of the complaint itself all done at once. Nor do there seem to be a proliferation of trips to Alexandria — there were only four — and the mails seems to have been resorted to frequently. The contested time spent for the trip to Alexandria will be allowed as reasonable.

The defendant also contests an allowance for any time spent on issues on which the plaintiffs did not prevail, namely, plaintiffs' asserted right to counsel and relief for the plaintiff Allen. It is true that the right to counsel issue was not reached by the court, but if the defendants' position, which was that it *was* proper to incarcerate for failure to make bail, persons charged with non-jailable offenses, had prevailed, then clearly the right to counsel would have become a major issue in the case. In disagreement with the defendants, however, the court concludes that it was not one of the major issues in the case. But even if it was, it was not a frivolous issue, and as indicated it could have become a major issue. Moreover, and this is also the case with respect to the relief for the plaintiff Allen, plaintiffs' counsel ought not to be penalized for asserting substantial issues in an action, merely because they were not completely successful on all issues. Otherwise counsel in cases such as this might become too timid to assert substantial issues for fear that they would not be

compensated for the time spent on them if they were not entirely successful. In any event, the two issues mentioned were intimately connected with the principal issue, namely, whether persons could be incarcerated for non-jailable offenses solely because of an inability to make bond. On this principal issue the plaintiffs clearly prevailed, and the time spent on related issues will be allowed as reasonable and necessary.

The factors to be considered by the court in allowing attorney's fees are outlined in *Barber v. Kimbrell's, Inc.*, 557 F.2d 216, 226 (4th Cir. 1978), and the court will consider them in order:

1. *The time and labor expended.* As pointed out previously, the court finds the number of hours and costs to be reasonable and necessary, and, indeed, with the one exception noted the defendants do not contest them. While the case did not go to trial, but was resolved on summary judgment, it is apparent that interviewing witnesses, conferences, written submissions, and appearances in court were time consuming. None of the time spent appears wasteful.

2. *The novely and difficulty of the questions raised.* The case was a novel one and involved serious, although basic, constitutional questions.

3. *The skill required to perform properly the legal services rendered.* There was a skillful marshalling and presenting of the case by counsel. The written submissions were concise and expertly prepared and the constitutional issues thoroughly researched.

4. *The attorneys' opportunity costs in pressing the instant litigation.* While there is no evidence that accept-

ance of this particular lawsuit precluded plaintiffs' attorney from accepting any specific other engagement, there is no question that a substantial amount of time was required — time that the attorney was not free to use for other purposes.

5. *The customary fee for like work.* Inquiry and the court's experience in these cases reveal that trial work of this type in this area commands a fee of $50.00-$100.00 per hour. The attorney for the plaintiffs customarily charges $75.00 per hour for her time.

6. *The attorney's expectations at the outset of the litigation.* The fees here were contingent, i.e., the attorney was only to be paid if the plaintiffs prevailed. Consequently the attorney ran the risk of getting nothing. While perhaps this should not enlarge the amounts requested, it as a factor certainly weighs against any reduction in the amount requested.

7. *Time limitations imposed by the client or circumstances.* There is no evidence that the client or circumstances imposed any time limitation on the attorney.

8. *The amount in controversy and the results obtained.* While no monetary damages were sought or recovered, the result obtained was excellent. Liability was vigorously contested. Moreover the result obtained, which proscribes future conduct of the defendants, inures to the benefit of others in plaintiffs' circumstances.

9. *Experience reputation and ability of counsel.* Plaintiffs' counsel is a relatively inexperienced member of the bar. Her requested hourly rate, in the lower portion of the range of fees for this type of work, reflects this. Yet she made a thoroughly professional and imaginative presenta-

tion, equal to that of many more experienced practitioners. The record does not indicate that she has had experience in this type of case before.

10. *The undesirability of the case within the legal community in which the suit arose.* This case is not undesirable from the point of view of the community or counsel's contemporaries.

11. *The nature and length of the professional relation between attorney and client.* There is no evidence that this is anything except a single instance of representation of these plaintiffs by this attorney.

12. *Attorney's fees awarded in similar cases.* Fees in these cases range from a minimum of $50.00 per hour to a maximum of approximately $100.00 per hour, with an occasional bonus. Cases in which the lower range was awarded usually involved instances where there was a proliferation of attorneys, where the result obtained was minimal or where the case clearly had been overtried or time clearly wasted on unnecessary efforts. None of these factors is present here. Lawyers with minimal experience generally have received fees in the lower range; and the fee request here, by comparison with those the court sees for comparable cases, can only be described as modest.

For the foregoing reason the court concludes that the requested fee of $60.00 per hour, or $7,308.00, should be allowed in full.

/s/ Albert V. Bryan, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 81-1781

Richmond R. Allen and
Jesse W. Nicholson,

Appellees,

v.

Basil C. Burke, Jr., Judge of
the General District Court for the
County of Culpeper, Virginia,

Defendant,

and

Gladys Pulliam, Magistrate for the
County of Culpeper, Virginia,

Appellant.

ERVIN, Circuit Judge:

Gladys Pulliam, Magistrate for Culpeper County, Virginia, appeals from an order of the district court awarding $7,308.00 in attorney fees against her pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Pulliam contends that, as a judicial officer, she is absolutely immune from an award of attorney fees. In the alternative, she contends that the district court abused its discretion by awarding excessive attorney fees.

We hold that judicial officers are not immune from an award of attorney fees in an action in which prospective

relief is properly awarded against a judicial officer. We also hold that the attorney fees awarded by the district court were reasonable in this case. The order of the district court, therefore, is affirmed.

I.

On January 10, 1980, Richmond R. Allen was arrested in Culpeper County, Virginia, on a charge for which incarceration is not authorized under Virginia law.[1] Magistrate Pulliam incarcerated Allen until his trial fourteen days later, however, solely because he was not able to meet $250.00 bail.[2] He was not advised of his right to appointed counsel or taken before a judge[3] until his trial before the Honorable Basil C. Burke, Jr. in the General District Court of Culpeper County.

Allen subsequently brought a 42 U.S.C. § 1983 action against Magistrate Pulliam and Judge Burke in which he sought declaratory and injunctive relief. He alleged that he had been incarcerated for a non-incarcerable offense and denied his right to counsel in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments.[4]

The district court declared unconstitutional the practice of incarcerating persons for non-incarcerable offenses solely for failure to meet bail and granted injunctive relief against Magistrate Pulliam, in her official capacity.[5] Because the court found that incarceration was unconsti-

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[1] Allen was arrested for using abusive language in violation of Va. Code § 18.2-416. Such an offense is a Class 3 misdemeanor for which the maximum penalty is a $500.00 fine.

[2] The magistrate regularly incarcerated persons charged with Class 3 and Class 4 misdemeanors if they could not meet bail, even though such offenses are not punishable by incarceration.

tutional in the first instance, it did not reach the issues concerning Allen's rights following incarceration.

Allen subsequently filed a request for $7,308.00 in attorney fees and costs pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The request was based on the actual hours spent on the case calculated at an hourly rate of $60.00.

Magistrate Pulliam filed an objection to the request on the ground that it was excessive. She argued that (1) the fees requested should have been based only on the work performed on the issues decided in Allen's favor and not for work on the issues never reached by the court; (2) an hourly rate of $60.00 was excessive; and (3) the request included an unnecessary six-hour trip to Alexandria, Virginia, to file a complaint.

The district court awarded the requested fees, finding that (1) although the first appearance and right to counsel issues were not central to the case, they could have been important had Allen lost on the first issue; (2) an hourly rate of $60.00 was reasonable because there were serious constitutional issues involved, the claim was novel, and the case was handled skillfully by Allen's counsel; (3)

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[3] Va. Code § 19.2-158 requires that an accused who is incarcerated be brought before a trial judge on the first day the judge sits after the accused is incarcerated.

[4] The court subsequently granted a motion allowing Jesse W. Nicholson to intervene. Nicholson had been charged with a Class 4 misdemeanor and incarcerated when he was not able to meet bail.

[5] The district court dismissed Judge Burke as a defendant, finding that his involvement in the unconstitutional incarceration was insignificant.

none of the time spent appeared to be wasteful; and (4) the time alloted for filing the complaint and acquiring permission to proceed *in forma pauperis* was not unreasonable. The court further noted that the case was a contingency case, which weighed against any decrease in what the court described as the "modest" amount requested.

II.

Although judges and prosecutors are absolutely immune from liability for money damages, *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967), this court has held, in *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom. Leeke v. Timmerman*, 102 S.Ct. 69 (1981),[6] that judicial immunity does not extend to injunctive and declaratory relief under 42 U.S.C. § 1983. *Accord, Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Harris v. Harvey*, 605 F.2d 330, 335 n.7 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); *Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978). The question presently before us is whether a judicial official is liable for attorney fees under 42 U.S.C. § 1988 when judicial immunity is not a bar to prospective relief.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that in any action under 42

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[6] The extent of the Supreme Court's discussion of judicial immunity in *Leeke v. Timmerman*, 102 S.Ct. 69 (1981), is a footnote in which the Court acknowledged that the Fourth Circuit had held that a state magistrate was not immune from declaratory and injunctive relief. *See id.* at 71 n.1.

U.S.C. § 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *See Hutto v. Finney*, 437 U.S. 678, 694 (1978). In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738-39 (1980), the Supreme Court held that attorney fees may be recovered against an official under 42 U.S.C. § 1988 when prospective relief is properly awarded against the official.[7] The Court found, on the basis of the legislative history of § 1988, that Congress intended for attorney fees to be awarded under § 1988 to claimants who obtain prospective relief against an official but who otherwise are barred from recovering damages against the official. *Id.* Indeed, the House Report states:

> Furthermore, while damages are theoretically available under the statutes covered by (§ 1988), it should be observed that, in some cases, immunity doctrines and special defenses, available only to

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[7] In *Consumers Union*, two citizens groups sued the Supreme Court of Virginia for promulgating and enforcing an unconstitutional state bar disciplinary rule that prohibited attorneys from advertising. The Supreme Court held that the Virginia court was absolutely immune from both damage liability and prospective relief in its legislative capacity, but that in its enforcement capacity, it was not immune from prospective relief, and the concomitant award of attorney's fees. The Court refrained from considering whether judicial immunity is a bar to prospective relief under § 1983. 446 U.S. at 735-36. The Court noted, however, that it had never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief, and that the Court previously has granted injunctive relief against state judges in cases where the issue of judicial immunity was not raised. *Id.* at 735 n.14 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Mitchum v. Foster*, 407 U.S. 225 (1972)). Although the Supreme Court has never held that judicial immunity is not a bar to prospective relief, it is the law in this circuit. *See Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom. Leeke v. Timmerman*, 102 S.Ct. 69 (1981).

> public officials, preclude or severely limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 1558, 94th Cong., 2nd Sess. 9 (1976).[8]

We hold, therefore, that a prevailing party may recover attorney fees against a judicial official under 42 U.S.C. § 1988 when prospective relief is properly awarded against the official. *See Morrison v. Ayoob*, 627 F.2d 669, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). Because prospective relief was properly awarded against Magistrate Pulliam, *see Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub. nom. Leeke v. Timmerman*, 102 S.Ct. 69 (1981), Allen was entitled to an award of attorney fees under 42 U.S.C. § 1988.

III.

Magistrate Pulliam further contends that the amount of attorney fees under 42 U.S.C. § 1988 was excessive. We disagree.

This court has recognized that the allowance of attorney fees " 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts

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[8] In *Pierson v. Ray*, 386 U.S., 547 554-55 (1967), the Supreme Court indicated that Congress has the power to abrogate judicial immunity. Footnote 17 of the House Report contains a citation to *Pierson v. Ray*, which further suggests that Congress intended to allow an award of attorney fees against an official despite immunity from damage liability. *See Morrison v. Ayoob*, 627 F.2d 669, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong.' " *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (quoting *United States v. Anglin & Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944), *cert. denied*, 324 U.S. 844 (1945). The facts and circumstances to be considered by the district court in determining reasonable attorney fees include:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978). Because we recognized that "merely providing a checklist of factors to consider does not lead to consistent results or, in many cases, reasonable fees," we articulated a method for applying these factors in *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1981) (quoting *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 642 (6th Cir. 1979)). The district court initially should multiply the number of hours reasonably expended ("time and labor expended") by the customary hourly

rate ("customary fee for like work") to establish a preliminary amount for the fee award. The court then should consider the other factors and adjust the fee accordingly. 658 F.2d at 249.

In this case, the district court reviewed each of the twelve factors and determined that the $7,308.00 attorney fee requested by Allen was "modest" in light of the fact that the case was novel, involved serious constitutional questions, was skillfully presented by counsel, and was taken on a contingency basis.[9] We have reviewed the record and concluded that, under all the facts and circumstances, the attorney fee awarded by the district court in this case was entirely reasonable. Accordingly, the district court's award of attorney fees is affirmed.

IV.

For the foregoing reasons, the award of attorney fees by the district court is affirmed.

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[9] Because this case was decided before *Anderson* v. *Morris*, *supra*, the district court did not have the benefit of that case. The attorney fee awarded by the district court, however, essentially was determined in the manner prescribed by *Anderson* v. *Morris*. Allen's request for $7,308.00 in attorney fees was based on the actual hours spent calculated at an hourly rate of $60.00. The district court determined that all of the hours submitted were reasonably expended and that an hourly rate of $60.00 was reasonable in light of the fact that the customary hourly rate for such a case was between $50.00 and $100.00.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 81-1781

Richmond R. Allen, et al, *Appellees,*

versus

Gladys Pulliam, etc., *Appellant.*

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and a majority of judges in active service did not vote in favor of the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin.

For the Court,
/s/ William K. Slate, II
Clerk

November 29, 1982

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUN 9 1983
STEVAS
CLERK

No. 82-1432

In The

Supreme Court of the United States

October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 25, 1983
CERTIORARI GRANTED APRIL 25, 1983

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In The

Supreme Court of the United States

October Term, 1982

No. 82-1432

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

OPINIONS AND ORDERS OF COURTS BELOW

Opinions and Orders of the District Court entered on June 4, 1981 and July 6, 1981, are not reported but are reproduced herein as well as in the Appendix to the Petition for a Writ of Certiorari. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued September 29, 1982, is reported at *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982), and a copy is contained herein and in the Appendix of the Certiorari Petition.

DOCKET ENTRIES

January 16, 1981—Complaint filed January 16, 1981. Summons issued and given to Marshal for service.

January 16, 1981—Motion for leave to proceed in forma pauperis filed by pltf.

January 16, 1981—Affidavit in support of Motion to proceed in forma pauperis filed by pltf.

January 16, 1981—Order permitting pltf. to proceed in forma pauperis. Ent. January 16, 1981, filed. Copies mailed.

February 2, 1981—Marshal's return on summons executed 1-21-81 as to deft. Gladys Pulliam; executed 1-29-81 as to deft. Basil C. Burke, Jr. Filed.

February 9, 1981—Motion to Dismiss Pltf's Complaint filed by deft. Magistrate Gladys Pulliam.

February 11, 1981—Memorandum of Law filed by deft. Magistrate Gladys Pulliam.

February 17, 1981—Motion to Dismiss filed by deft. Basil C. Burke, Jr.

February 17, 1981—Memorandum in Support of Motion to Dismiss under Rule 12 (b) filed by deft. Basil C. Burke, Jr.

February 17, 1981—Affidavit of Basil C. Burke, Jr. filed by deft.

February 17, 1981—Affidavit of Raymond B. Alexander filed by deft. Basil C. Burke, Jr.

February 23, 1981—Response to motion filed by pltf.

February 24, 1981—Brief in Response to deft's. Memoranda of Law together with Affidavit of pltf., Richmond B. Allen filed by pltf.

February 25, 1981—Pretrial Order. All discovery must be concluded by 5-15-81. Formal pretrial set for 5-21-81 at 10:50 a.m. Ent. February 25, 1981, filed. Copies mailed.

March 2, 1981—Notice returnable 4-10-81 for hearing Motion to Dismiss filed by deft. Basil C. Burke, Jr.

March 5, 1981—Notice returnable 4-10-81 for hearing Motion to Dismiss filed by deft. Gladys Pulliam.

March 27, 1981—Motion to certify a Class; Memorandum in support of Motion filed by pltf.

March 27, 1981—Motion for default judgment filed by pltf.

March 27, 1981—Brief in support of Unconstitutionality of defts' actions filed by pltf.

March 27, 1981—First Request for Admissions by deft. Pulliam filed by pltf.

March 27, 1981—First Request for Admissions by deft. Burke filed by pltf.

April 3, 1981—Motion & Response (motion for leave to file answer, response to pltf's motion for default judgment) filed by defts.

April 6, 1981—Response to Motion to Certify a Class Action filed by defts.

April 6, 1981—Memorandum of Law filed by defts.

April 10, 1981—Affidavit of Richmond R. Allen filed by pltf.

April 24, 1981—Answers to request for admissions filed by deft. Basil C. Burke, Jr.

April 28, 1981—Notice returnable 5-8-81 for hearing Motion to certify a Class and Motion for default judgment filed by pltf.

April 28, 1981—Notice returnable 5-8-81 together with Motion to Intervene by Jesse W. Nicholson and the filing of a Complaint filed by Jesse W. Nicholson.

May 8, 1981—Trial Proceedings: J. Bryan; Reporter: McCoy. Appearances of counsel. This matter came on for hearing of Motions. Deft. Burke's Motion to dismiss—argued and denied. Deft. Pulliam's Motion to dismiss—

argued and denied. Pltf's Motion to certify a Class—argued and denied. Pltf's motion for default judgments—argued and denied. Deft's motion to file answer—argued and granted. Jesse W. Nicholson's motion to intervene as additional Party Pltf. and the filing of complaint—granted.

May 8, 1981—Intervenors Complaint adding Jesse W. Nicholson as a Party Pltf. filed.

May 18, 1981—Notice returnable 5-29-81 together with Motion for summary judgment; Brief in support of same filed by Pltfs.

May 21, 1981—Pretrial Conference: Appearance of counsel. This matter came on for formal pretrial. Case set for trial by the Court on 6-16-81.

May 21, 1981—Stipulation of Facts filed.

May 21, 1981—List of Witnesses filed by defts.

May 21, 1981—List of Witnesses and List of Exhibits filed by pltfs.

May 29, 1981—Trial Proceedings: J. Bryan. Reporter: McCoy. This matter came on for hearing on Pltfs. motion for summary judgment. Appearances of counsel. Motion argued and taken under advisement.

May 29, 1981—Answer filed by defts.

May 29, 1981—Response to Motion for summary judgment together with Memorandum of law filed by defts.

June 4, 1981—Memorandum Opinion filed.

June 4, 1981—Order in accordance with Memorandum Opinion dismissing Judge Basil C. Burke, Jr., as deft; Summary judgment is granted to pltfs. against remaining deft. Pltf's counsel are directed to submit a request for costs and attorney's fees to deft. within 10 days, etc. Ent. June 4, 1981, filed. Copies mailed.

June 15, 1981—Copy of letter to Linwood Wells, Asst.

Atty. Gen., setting forth attorney's fees and costs pursuant to Order of 6-4-81, from the pltf. Received.

June 26, 1981—Objections to request for attorney's fees filed by deft. Memorandum filed.

July 2, 1981—Response to Objection & Memorandum with regard to attorney's fees and cost[illegible]ed by pltf.

July 6, 1981—Memorandum Opinion filed. Copies mailed.

July 6, 1981—Order in accordance with the Memorandum Opinion allowing attorney's fees in the amount of $7,308.00 and costs in the amount of $383.09, Total amount $7,691.09, awarded against the deft. Gladys Pulliam, Magistrate for the County of Culpeper. Ent. July 6, 1981, filed. Copies mailed.

July 27, 1981—Notice of Appeal of Order of 7-6-81 filed by deft. Copy of notice mailed to Wyatt. Copy of Notice, Order and docket entries mailed to U. S. Court of Appeals.

July 27, 1981—Motion for Stay pending appeal filed by deft. Pulliam. (To be heard 7-31-81 at 10:00 a.m.) Parties waived oral hearing.

July 30, 1981—Petition and Order that the deft. Pulliam be exempt from the requirements of obtaining a bond for costs of appeal, and that the Court's judgment of 7-6-81 be stayed to abide the ruling of the Court of Appeals. Ent. July 30, 1981, filed. Copies mailed.

October 29, 1981—Issues to be presented on appeal filed by deft.

COMPLAINT (MINUS ATTACHMENTS) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

RICHMOND R. ALLEN,

Plaintiff,

v.

BASIL C. BURKE, JR., Judge of the General District Court for the County of Culpeper, Virginia, and

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Defendants.

Civil Action No. 81-004
Filed Jan. 16, 1981
Clerk, U. S. District Court
Alexandria, Virginia

COMPLAINT

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 (3) and (4), 28 U.S.C. § 2201, and Rule 57 of the Federal Rules of Civil Procedure.

Parties

2. Richmond R. Allen is over the age of eighteen years, and is a resident of the County of Nelson, Virginia, in central Virginia.

3. Basil C. Burke, Jr., was, at the time of the actions as alleged herein, and, based on information and belief, continues to be Judge of the General District Court for the County of Culpeper, Virginia, in central Virginia.

4. Gladys Pulliam was, at the time of the actions as alleged herein, and, based on information and belief, continues to be Magistrate for the County of Culpeper, Virginia, in central Virginia.

5. Both Defendants were, at the time of the actions as alleged herein, and continue to be for all purposes of this Complaint, acting under color of state and local law.

Cause of Action

6. Plaintiff in the current action seeks declaratory and injunctive relief as allowed by 42 U.S.C. § 1983 for himself and on behalf of all other persons similarly situated, and seeks, in addition, costs and attorneys fees against Defendants as permitted by 42 U.S.C. § 1988.

Class Action Allegations

7. Plaintiff brings this action on behalf of himself and on behalf of all other persons similarly situated as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

8. The other individuals similarly situated include all persons who are now being or may in the future be incarcerated in the County of Culpeper for Class 3 or Class 4 misdemeanors or for any other infraction of the law, such as traffic violations, for which the maximum penalty does not include incarceration, the numbers and names of which members are impossible to discern and for which purpose the joinder of the class members individually would be therefore impracticable and impossible.

9. If individual class members were to institute separate proceedings, such adjudication with respect to the individual members' suits would be dispositive of the interest of other class members and would substantially impair the ability

of other class members to protect their interest and would create the possibility of inconsistent adjudication.

10. The actions of the Defendants with regard to Plaintiff as alleged herein are generally applicable to the class as a whole, and final declaratory and injunctive relief will be appropriate with respect to the class as a whole.

11. All of the substantial questions of law and fact pertaining to the claims of Plaintiff are common also to the claims of the class members.

12. The questions of law governing Plaintiff's suit are identical to those which would be presented by other class members.

13. Plaintiff's allegations are typical of the claims of all of the class members and are based upon factual situations similar in each instance arising out of the unconstitutional conduct by the Defendants as alleged herein.

14. Plaintiff through his counsel will fairly and adequately represent the interest of the class.

Facts

15. On January 10, 1980, the police authorities in Culpeper County arrested two men for allegedly violating § 18.2-416 of the Code of Virginia, a Class 3 misdemeanor; both men were arrested for conduct arising from the same nucleus of facts.

16. Under Virginia law, the maximum penalty for either a Class 3 or Class 4 misdemeanor is a fine; neither at the time of the actions as alleged herein nor at the present is incarceration provided as a penalty for violation of a Class 3 or Class 4 misdemeanor.

17. One of the two men arrested was the Plaintiff, who is black, who was unable to post a $250.00 bond set by Defendant Pulliam, who was committed to jail by Defend-

ant Pulliam, and who remained incarcerated until his trial on January 24, 1980; the Plaintiff's trial was also his first appearance before the Court.

18. The other man arrested was George E. Cambill, a white man, who was also unable to post a $250.00 bond and remained incarcerated until his trial on January 17, 1980; Mr. Cambell's trial was also his first appearance before the Court.

19. During incarceration, Plaintiff was not advised of a right to an attorney and had no attorney.

20. Plaintiff was found guilty at this trial on January 24, 1980, and received a five-day jail sentence, still without being advised of his right to an attorney.

21. The actions by both Defendants as set forth herein are continuously occurring and present a substantial and imminent liklihood [sic] that the actions will be repeated as to both Plaintiff himself and other class members.

22. Because of the nature of the actions by Defendant and the claims as set forth herein, it would have been virtually impossible for Plaintiff, as it would be for other class members, to bring these claims while the actions were occurring but rather such actions as form the basis for Plaintiff's claims, though constantly repeated, will always escape the review of this Court while they are occurring.

Causes of Action

Count I

23. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22.

24. The Magistrate who committed Plaintiff to jail was Defendant Gladys Pulliam.

25. Because the alleged offense was only a Class 3 misdemeanor, Defendant Pulliam ordered the incarceration of

Plaintiff for an offense which, if convicted, could not cause Plaintiff to be incarcerated.

26. Committing Plaintiff to jail for an offense which has been deemed by the state legislature for the State of Virginia as insufficiently significant or criminal to warrant incarceration if convicted is, under any circumstances and under the circumstances of Plaintiff's incarceration, a violation of the guarantees of due process as provided by the Fifth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment.

Count II

27. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22 and Paragraphs 24 and 25.

28. Defendant Pulliam's actions constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment.

Count III

29. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22.

30. Virginia Code § 19.2-158 requires that an accused who is incarcerated be brought before the trial judge on the first date on which the judge is sitting after the accused is incarcerated.

31. Defendant Burke sat on January 17, 1980.

32. As set forth in the Affidavit of Melvin Richard Dwyer, a copy of which is attached hereto as Plaintiff's Exhibit 1, Mr. Dwyer, the bailiff, is and was at the time of the actions as alleged herein in charge of arranging for such persons to be brought before the judge pursuant to § 19.2-

158; however, on January 17, 1980, Mr. Dwyer specifically asked Defendant Burke whether Plaintiff should be brought before him and was ordered not to do so by Defendant Burke.

33. Refusing to allow Plaintiff to be brought before Defendant Burke as required by § 19.2-158, which section insures certain rights guaranteed by the United States Constitution, violated Plaintiff's right to due process as guaranteed by the Fifth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment.

Count IV

34. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22 and Paragraphs 30, 31, and 32.

35. By Defendant Burke's refusal to allow the Plaintiff to be brought before him as required by § 19.2-158 but rather causing Plaintiff to remain incarcerated until his trial on January 24, 1980, constituted cruel and unusual punishment in violatior of the Eighth Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment.

Count V

36. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22 and Paragraphs 30, 31, and 32.

37. Virginia Code § 19.2-158 provides that, at the first appearance before the trial judge as therein provided, an accused be informed of his right to counsel.

38. Because Plaintiff was denied his first appearance as required by § 19.2-158, he was never advised of his right

to counsel and, in fact, did not receive either such advice or counsel to represent him at his trial on January 24, 1980.

39. As a result of the actions by Defendant Burke, Plaintiff was deprived of his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment.

Count VI

40. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22.

41. Sentencing Plaintiff to five days in jail for an offense the maximum penalty for which does not include incarceration constitutes a deprivation of Plaintiff's right to due process in violation of the Fifth Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment.

Count VII

42. Plaintiff incorporates and reavers as if set forth fully herein Paragraphs 1 through 22.

43. Sentencing Plaintiff to five days in jail for an offense the maximum penalty for which does not include incarceration constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment.

Relief

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

(a) Certify a class of all persons who are being or may in the future be incarcerated in the County of Culpeper for

Class 3 or Class 4 misdemeanors or for any infraction of the law, such as traffic violations, for which the maximum penalty does not include incarceration;

(b) Declare the actions of Defendant Pulliam in having Plaintiff incarcerated awaiting trial for an offense the maximum penalty for which does not include incarceration unconstitutional;

(c) Enjoin Defendant Pulliam from ever in the future having an accused incarcerated awaiting trial for an offense the maximum penalty for which does not include incarceration;

(d) Declare the actions of Defendant Burke in refusing to allow Plaintiff his first appearance as provided by § 19.2-158 unconstitutional;

(e) Enjoin Defendant Burke from ever in the future denying an accused his rights as set forth in § 19.2-158;

(f) Declare the actions of Defendant Burke in sentencing Plaintiff to jail for an offense the maximum penalty for which does not include incarceration unconstitutional;

(g) Enjoin Defendant Burke from ever in the future sentencing an accused to jail for an offense the maximum penalty for which does not include incarceration;

(h) Declare the actions of Defendant Burke in not advising Plaintiff of his right to counsel unconstitutional;

(i) Enjoin Defendant Burke from ever in the future failing to inform an accused of his right to counsel as required by § 19.2-158 and the United States Constitution;

(j) Award Plaintiff reasonable attorneys fees and costs and such other and further relief as to this Court seems meet.

Respectfully submitted,
RICHMOND R. ALLEN
By Counsel

DEBORAH C. WYATT
STEVEN D. ROSENFIELD
WYATT & ROSENFIELD
917 East Jefferson Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHMOND R. ALLEN

Plaintiff,

v.

BASIL C. BURKE, JR., Judge of the General District Court for the County of Culpeper, Virginia, and GLADYS PULLIAN, Magistrate for the County of Culpeper, Virginia

Defendants.

Civil Action No. 81-0040-AM
Filed Feb. 11, 1981
Clerk, U. S. District Court
Alexandria, Va.

MOTION

Now comes the Defendant, Gladys Pulliam, Magistrate, and pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure,* moves the Court to dismiss Plaintiff's Complaint as follows:

1. Plaintiff has failed to state a claim for which relief can be granted for the following reasons:

(a) The issues which Plaintiff raises are moot.

(b) No Constitutional right of the Plaintiff was violated.

(c) Plaintiff is not entitled to an attorney's fee.

(d) Defendant is immune from liability.

(e) An injunction may not be entered against a magistrate.

WHEREFORE, the Defendant, Gladys Pulliam prays that the Court dismiss Plaintiff's Complaint.

LINWOOD T. WELLS, JR.
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 23219

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHMOND R. ALLEN

Plaintiff,

v.

BASIL C. BURKE, JR., Judge of the General District Court for the County of Culpeper, Virginia, and GLADYS PULLIAN, Magistrate for the County of Culpeper, Virginia

Defendants.

Civil Action No. 81-0040-AM
Filed Feb. 11, 1981
Clerk, U. S. District Court
Alexandria, Va.

MEMORANDUM OF LAW

I. The Issues Which Plaintiff Raises Are Moot.

Plaintiff was arrested for violation of the provisions of § 18.2-416, Code of Virginia (1950), as amended, which makes punishable as a Class 3 misdemeanor, the use of abusive language to another. Section 18.2-211 provides that punishment for a Class 3 misdemeanor to be a fine of not more than $500.00.

Section 19.2-74 provides that whenever a person is arrested for violation of a misdemeanor the arresting officer is to take the name and address of such person and issue a summons and release him from custody. However, the section also contains the following language:

> Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to

be likely to disregard a summons issued under the provisions of this section, the arresting officer shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons, who shall determine whether or not probable cause exists that such person is likely to disregard a summons.

Notwithstanding the above, if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, the officer may take such person before a magistrate or other issuing authority of the county or city in which the violation occurred and request the issuance of a warrant.

Plaintiff was arrested on January 10, 1980. He claims that as a matter of Constitutional law, persons charged with crimes for which the punishment does not include confinement may not be confined awaiting trial.

This issue is now moot as a result of enactment by the 1980 Session of the General Assembly of § 19.2-74.1, which became effective July 1, 1980. This section requires that persons arrested for misdemeanors which they cannot receive a jail sentence be issued a summons and makes no provision for detention awaiting trial.

II. No Constitutional Right Of The Plaintiff Was Violated.

Plaintiff seems to argue that in cases where one is charged with a crime for which he may not be punished by confinement no detention awaiting trial, as a matter of law, is constitutionally permissible. He attempts to equate punishment with detention awaiting trial where bail has been set. These are not the same, and should not be so regarded. The right to detain persons awaiting trial for crimes for which the punishment does not include confinement has

been recognized. *See, e.g., People* v. *Scott,* 71 Misc.2d 266, 335 N.Y.S.2d 659 (1972) (bail of $300 upheld on charge of drunk driving where minimum fine was $250); *Webber* v. *State,* 239 P. 566 (Okla. 1925) (bail of $500 on charge of public drunkenness, while not ordinarily permissible, may be upheld upon showing of aggravating circumstances); *Ex parte Farrell,* 37 S.W. 328 (Crim.App.Tex. 1896) (bail of $150 on charge of fornication, punishable by fine of $50-$500, proper under ordinary circumstances). *See also, State* v. *McCoy,* 4 Conn.Cir.Ct. 109, 226 A.2d 116 (1966).

III. Defendant Is Immune From Liability.

Defendant is immune from liability and therefore Plaintiff is not entitled to recover an attorney's fee. *Timmerman* v. *Brown,* 528 F.2d 811 (4th Cir. 1975); *Bellamy* v. *Gates and Gill,* 214 Va. 314, 200 S.E.2d 533 (1973); *Berry* v. *Smith,* 148 Va. 424, 139 S.E. 252 (1927); and *Stump* v. *Sparkman,* 435 U.S. 340 (1978).

IV. An Injunction May Not Be Entered Against A Magistrate.

An injunction may be appropriate in some 42 U.S.C. § 1983 actions, but in the case of a judicial officer, there is a real question as to whether it is appropriate or even permissible. In the instant case, such a remedy would be entirely inappropriate. *See, Timmerman, supra.*

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(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JESSE W. NICHOLSON,

Plaintiff,

v.

BASIL C. BURKE, JR., Judge of the General District Court for the County of Culpeper, Virginia, and GLADYS PULLIAN, Magistrate for the County of Culpeper, Virginia,

Defendants.

Civil Action No. 81-0040-A
Filed May 28, 1981
Clerk, U. S. District Court
Alexandria, Va.

ANSWER

Now come the Defendants, by counsel, and for Answer to the Complaint exhibited against them state as follows:

1. Defendants admit the allegations contained in Paragraphs 3, 4, 5, 7, 8, 9, 11, 12, 14, and 15.

2. As to the allegation contained in Paragraph 2 of Plaintiff's Complaint, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

3. As to the allegations contained in Paragraph 6 of Plaintiff's Complaint, Defendants answer the same as in *Allen* v. *Burke, et al.*, Civil Action No. 81-0040-A.

4. Defendants deny the allegations contained in Paragraphs 10, 13, 16, 17, 19, 20, 22, 24, 25, 28, 30, 31, and 32.

5. Defendants affirmatively state that the provisions of § 19.2-158, Code of Virginia (1950), as amended, apply

only to persons who may receive as a penalty for committing an offense the term of confinement.

6. Defendants affirmatively state that they are judicial officers and as such are immune from liability for money damages, payment of attorney's fees, or injunctive relief.

7. Defendants affirmatively state that they have denied the Plaintiff no constitutional right.

8. Defendants affirmatively state that injunctive or declaratory relief is inappropriate in the instant case and that the issues raised by Plaintiff are moot in view of State law.

9. Defendants affirmatively state that they acted in a good faith belief that their conduct was within the requirements of law.

WHEREFORE, the Defendants pray that the Complaint be denied and dismissed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHMOND R. ALLEN and JESSE W. NICHOLSON,
Plaintiffs,

v.

BASIL C. BURKE, JR., Judge of the General District Court for the County of Culpeper, Virginia, *et al.*,
Defendants.

Civil Action No. 81-0040A

ORDER

Entered June 4, 1981

In accordance with Memorandum Opinion this day filed, it is hereby ORDERED and DECLARED that:

1. To the extent that Va. Code § 19.2-74 and § 19.2-74.1 authorize the incarceration of persons charged with misdemeanors for which no jail time is authorized, solely because they cannot meet bond, those sections are unconstitutional and void. Any pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger persists and must cease when the condition which created the danger changes or abates, or arrangements are made for release of the person into third-party custody under circumstances which abate the danger.

2. The provisions of Va. Code § 19.2-74 and § 19.2-74.1 which authorize pretrial detention for a person charged with violating Va. Code § 19.2-388 if he is deemed likely to disregard a summons, violates the equal protection

clause of the Fourteenth Amendment and is void, as long as Va. Code § 19.2-74.1 exempts all other Class 3 and Class 4 misdemeanors from similar restriction.

3. The practice and course of conduct in Culpeper County, Virginia, under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond is unconstitutional and is hereby enjoined. In particular, any such conduct or practice by defendant Gladys Pulliam, magistrate, is declared unconstitutional, and she, and those carrying out such practices, are enjoined from such practices.

4. Defendant Judge Basil C. Burke, Jr., is dismissed from this action.

5. Summary judgment is granted to plaintiffs against the remaining defendant.

6. Plaintiffs, having substantially prevailed in this cause, are entitled to costs, including reasonable attorney fees, in accordance with 42 U.S.C. § 1988. Plaintiffs' counsel are directed to submit a request for costs to defendant within ten (10) days. If defendant disagrees with the request she is directed to state the reasons for disagreement to the court within ten (10) days after having received plaintiffs' request.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia

MEMORANDUM OPINION

Plaintiffs challenge the constitutionality of the Virginia state law[1] and local practice in Culpeper under which pretrial detainees are held in jail pending a trial, solely because they are unable to meet bail, on charges for which no incarceration is authorized and the maximum punishment is a fine. Plaintiffs, two arrestees who served time in jail because they were unable to post bond on Class 3 and Class 4 misdemeanors,[2] seek declaratory and injunctive relief against the judge of the General District Court and the magistrate of Culpeper County, Virginia. The action is brought under 42 U.S.C. § 1983, and jurisdiction is founded on 28 U.S.C. § 1343(3).

The matter is before the court on plaintiffs' motion for summary judgment, on which a hearing was had on May 29, 1981. The parties have entered into a *Stipulation of Facts*, which, together with exhibits contain all the material facts necessary to render summary judgment. The parties do not disagree on material facts.

The plaintiffs assert violation of the Eighth, Fourteenth and Sixth Amendment rights. Because the court finds the Fourteenth Amendment due process and equal protection claims dispositive, the other grounds will not be discussed.

The Stipulation of Facts and other uncontested facts revealed by the record and the arguments of counsel indicate that plaintiff Allen was arrested on January 10, 1980, on a Class 3 misdemeanor charge (Va. Code § 18.2-416, abusive and insulting language). Bond was set by defendant magistrate Gladys Pulliam at $250 which Allen was unable to meet. He was held in jail solely because of his inability

[1] Va. Code §§ 19.2-74 and 19.2-741.

[2] Maximum penalty for Class 3 and Class 4 misdemeanors is $500 and $100, respectively. Va. Code § 18.2-11 (1975 Repl. Vol.).

to meet bail for fourteen days until January 24, 1980, on which date he was tried by defendant Judge Burke, found guilty,[3] and released.

Plaintiff Nicholson was arrested on four occasions in Culpeper for violation of the Class 4 misdemeanor, drunk in public, Va. Code § 18.2-388. A $30 cash bond was required of Nicholson in connection with his arrests on December 26, 1980, December 30, 1980, January 16, 1981, and February 25, 1981. When he was unable to pay the bond, ordered on at least one occasion by magistrate Pulliam, he was committed to jail to await trial and was incarcerated for two days after the arrest on December 26, 1980, for four days after the arrest on December 30, 1980, for six days on January 16, 1981, and for two days on February 24, 1981.

The practice of requiring bail for Class 3 and Class 4 misdemeanors is not an isolated practice in Culpeper County. *Stipulation of Fact* 29 states: "Defendant Pulliam on many occasions requires a cash bond of $30.00 for a person arrested for a Class 4 misdemeanor, and, if the bond be not met, she commits such person to jail awaiting trial.

Stipulation No. 30 states: "Defendant Pulliam does also on occasion require a cash bond of $100.00 for violation of a Class 3 misdemeanor and, if such bond be not met, she commits such person to jail awaiting trial."

Stipulation No. 31 states: "Between September 30, 1980 and February 27, 1981, at least forty-nine (49) persons have been arrested for alleged violation of a class 3 or class 4 misdemeanor in connection with which a cash bond was required."

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[3] Judge Burke subsequently reopened the judgment and found Nicholson not guilty.

Stipulation No. 32 states: "Between September 30, 1980, and February 26, 1981, at least thirty-four (34) persons have been incarcerated for at least one day or night awaiting trial for alleged violation of a class 3 or class 4 misdemeanor."

While the *Stipulation of Facts* makes it clear that plaintiffs were held in jail solely because of their inability to make bail, counsel for the Commonwealth of Virginia indicated at the hearing on May 29, 1981, that the position of Attorney General is that those persons arrested for drunk in public, Va. Code § 18.2-388, who are held under the provisions of § 19.2-74 which authorizes the holding of any misdemeanant who is "likely to cause harm to himself or to any other person" should be held only for so long as he is a danger to himself or others and not necessarily until trial. The Assistant Attorney General also indicated that further interpretation of relevant state law might be forthcoming from the Office of the Attorney General. However, in view of the scheduled trial date for this matter on June 16, 1981, the court does not believe it can further delay ruling on the motion for summary judgment and will proceed on this matter on the basis of the record and legal position already advanced.

Defendants take the position that there is no constitutional right to be free from incarceration pending trial for a non-incarcerable offense if the detainee cannot meet bond. *See, Defendants' Memorandum in Support of Motion to Dismiss,* ¶ 2. Defendants' support for this proposition is, quite frankly, anemic. Of the four cases cited, only a 1896 case from the Texas Court of Criminal Appeals, *Ex Parte Ferrell,* 37 S.W. 328 (1896), is remotely on point. This one paragraph opinion upholds the incarceration of a defendant on a fornication charge after he was unable to

post the $150 bail. No constitutional issues were addressed; nor was it clear from the opinion whether the offense carried a jail time.[4]

This court believes there is a constitutional right not to be jailed solely for failure to make bond on an offense for which no incarceration is authorized by the state. It offends basic notions of fairness to subject a pretrial detainee, clothed with the presumption of innocence, to a greater punishment than he could receive after being found guilty, solely because of inability to pay a money bond. The liberty interest at stake here is an important one. Freedom from bodily restraint and punishment without due process by the state is one of the more basic guarantees of the constitution. *Ingraham* v. *Wright*, 430 U.S. 651 (1977). Or has, beyond doubt, "a substantial liberty interest in not being confined unnecessarily." *Parham* v. *J.R.*, 442 U.S. 485, 600 (1979).

The challenged practice also violates principles of equal protection. In *Williams* v. *Illinois*, 399 U.S. 235 (1970), the Supreme Court held unconstitutional an Illinois statute which permitted imprisonment beyond the maximum fixed by statute when the additional incarceration resulted directly from involuntary nonpayment of a fine or court costs. The Court held that "the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense to be the same for all defendants irrespective of their economic status." 399 U.S. at 244. This

[4] The other cases cited in defendants' constitutional argument are *People* v. *Scott*, 71 Misc. 2d 266, 335 N.Y.S. 2d 659 (1972); *Webber* v. *State*, 239 P. 566 (Okla. 1925); and *Connecticut* v. *McCoy*, 4 Conn. Cir. 109, 226 A. 2d 116 (1966). None of these cases address the constitutionality of detaining persons awaiting trial for crimes for which the maximum punishment does not include confinement.

decision invalidated statutes in each of the fifty states, including Virginia,[5] which allowed to one degree or another the state to incarcerate a defendant to work off a fine or court cost he was unable to pay.

The principle of the *Williams* case was extended by the Supreme Court in *Tate* v. *Short*, 401 U.S. 396 (1971), where the Court held unconstitutional a Texas statute which required that persons convicted of traffic offenses for which only fines were assessable could be nevertheless incarcerated for sufficient time to satisfy the fines at the rate of $5 a day. Imprisonment solely for indigency was held unconstitutional. 401 U.S. at 398.

Although both *Williams* and *Tate* deal with incarceration due to indigency after conviction, the principle applies with even greater force to pretrial detainees who are presumed innocent and who suffer before any trial a punishment unauthorized even after a determination of guilt.

The Commonwealth argues that the complaint of plaintiff Richmond Allen, who was held for fourteen days awaiting trial on a Class 3 misdemeanor has been mooted by the subsequent enactment of Va. Code § 19.2-74.1 (1980 Cumm. Supp.),[6] which prohibits the retention in custody

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[5] Repealed Va. Code § 19.1-399 (Supp. 1968) provided: "The circuit or corporation court in which any judgment for a fine is rendered may commit the defendant to jail until the fine is paid."

[6] Va. Code § 19.2-74.1 provides:

> A. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city or town ordinance or of any provision of this code punishable as a misdemeanor for which he cannot receive a jail sentence, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.
>
> Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of chapter 23 (§ 19.2-387 et seq) of this title. Reports to the Central Criminal Records Exchange concerning such

of any person arrested for a misdemeanor for which he cannot receive a jail sentence except for those arrested under the provisions of Va. Code § 18.2-388, profane swearing or drunk in public.

Since Allen was arrested for and charged with a violation of Va. Code § 18.2-416, abusive and insulting language, he could not lawfully be held in pretrial confinement under the terms of § 19.2-74.1. However, despite the disclaimer of the Assistant Commonwealth Attorney [*sic*] at the hearing, the record indicates that the magistrate in Culpeper continues to impose bail for those charged with Class 3 and Class 4 misdemeanors not limited to § 18.2-388, and if such bond is not met, commits such person to jail awaiting trial. *See, Stipulation of Facts* No. 30.

Va. Code § 19.2-74.1 excludes by its terms plaintiff Nicholson who was arrested for violating § 18.2-388, drunk in public. His pretrial detention is thus governed under the state statutory scheme by § 19.2-74 which provides generally that a person arrested for any misdemeanor, whether punishable by jail or not, should be issued a summons and not held in custody, but provides for exceptions in the case of "any person believed by the arresting officer to be likely to disregard a summons" or "if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person or is charged with committing any violation of § 18.2-407 [remaining at place of riot or unlawful assembly after warning to disperse, a Class 3 misdemeanor]. . . ."[7] For any arrestee deemed to

persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390.

B. The provisions of this section shall not be applicable to any detention or arrest made under the provisions of § 19.2-388. (1980, c. 344).

[7] The court makes no specific findings as to this provision since it is unrelated to the issues in this case.

fall into the exceptions in § 19.2-74 the arresting officer is authorized to take the person to a judicial officer who shall determine whether probable cause exists to place the person under an exception. The magistrate may then issue an arrest warrant on which bond could be set and incarceration could result if that bond were not met.[8]

Thus, under the Virginia law any person arrested under § 18.2-388, which includes not only drunk in public but also "profane swearing," if deemed likely either to disregard a summons or to be a danger to himself or others, could be incarcerated pending trial if he is not able to meet bond. As noted previously, *supra* p. 3, the Assistant Attorney General conceded at the hearing that to the extent that these statutes authorize pretrial detention for a public drunk who is deemed to be a harm to himself or others to continue for longer than that condition persists and beyond the time when the drunk has sobered, they are invalid. However, the statutes do not so state, and this qualification was not applied with respect to plaintiff Nicholson who was held for periods up to six days, long after he could be presumed to have become sober.

The court is sympathetic to the dilemma of the defendant magistrate who is confronted with a person arrested for public drunkenness and whose immediate release would create danger to the arrestee or to others. However, neither the statute nor the practice in Culpeper appears to be based on such concerns. Nicholson was detained solely because he could not meet the bond, and for periods up to six days.

The Virginia statutes and the practices in Culpeper which allow pretrial detention of those arrested for crimes for which no jail time is authorized, solely because of inability

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[8] The magistrate's power to issue arrest warrants and to set bail is found at Va. Code § 19.2-20, § 19.2-45(3) and § 19.2-123. Va.

to meet bail, are unconstitutional. This unconstitutionality specifically includes the provisions for drunks arrested pursuant to § 18.2-388 which places no limitation danger to the arrestee or to others has terminated. The statutory scheme is also unconstitutional with respect to those arrested under § 18.2-388 for whom pretrial detention is authorized under § 19.2-74 if it is deemed they are likely to disregard a summons.

Va. Code § 19.2-74.1 indicates that for all other misdemeanants, for whom no jail time is authorized, the state interest in securing the defendant's presence at trial is not so great as to justify the posting of bond or incarceration in lieu of bond. In other words, the legislature has by § 19.2-74.1 said that even if Class 3 and 4 offenders other than § 388 offenders are not likely to appear in response to a summons, the state is willing to accept this risk and possible loss of fine. The defendants offer no rationale for the distinction between § 388 offenders and all other Class 3 and 4 misdemeanants. The court considers this distinction created between § 388 misdemeanors and other misdemeanors for which no jail time is authorized to be irrational and to violate the Equal Protection Clause of the Fourteenth Amendment.

Appropriate declaratory and injunctive relief will be ordered in accordance with an order to be issued contemporaneously with this Memorandum Opinion.

It appears from the record that defendant Judge Burke's involvement in the unconstitutional laws and practices is minimal or non-existent. As District Judge he played no

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Code § 19.2-74.1 does not in terms refer to the power of magistrates but only to the duties of officers. This section must be read in conjunction with § 19.2-74 and the sections authorizing magistrates to require bond to complete the legislative scheme for the treatment of pretrial arrestees.

direct role in the pretrial detention of either plaintiff and was first aware of them and their detention only when they appeared before him for trial. Accordingly Judge Burke will be dismissed from the action. Summary judgment as to the remainnig defendant is granted to plaintiffs.

The plaintiffs, having substantially prevailed, are entitled to costs, including reasonable attorney fees, in accordance with 42 U.S.C. § 1988.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHMOND R. ALLEN, et al

Plaintiffs,

v.

BASIL C. BURKE, Judge of the General District Court for Culpeper County, Virginia, and GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia

Defendants.

Civil Action No. 81-0040-AM
Filed June 26, 1981
Clerk, U. S. District Court
Alexandria, Va.

OBJECTIONS TO PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

Now come the Defendants, by counsel, and move the Court to reduce the request of Plaintiffs for attorney's fees for the reasons stated in the Memorandum of Law, hereto attached.

WHEREFORE, the Defendants pray that the Court reduce the request of Plaintiffs for attorney's fees.

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(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHMOND R. ALLEN, et al

Plaintiffs,

v.

BASIL C. BURKE, Judge of the General District Court for Culpeper County, Virginia, and GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia

Defendants.

Civil Action No. 81-0040-AM
Filed June 28, 1981
Clerk, U. S. District Court
Alexandria, Va.

MEMORANDUM OF LAW

Plaintiffs' counsel requests a total of $7,038 in counsel's fees, and, in addition, costs. Defendants object to an award in that amount.

The factors to be considered in setting an award of atorney's fees are set forth in *Barber* v. *Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). The following consists of application of those factors to the instant case, as viewed by Defendants.

1. TIME AND LABOR EXPENDED. Time spent on various aspects of the case, as reflected in Plaintiff's request is not unreasonable, except Item 8, six hours expended for a trip to Alexandria to obtain an In Forma Pauperis Order and to file the suit. All of this could have been done by

mail, and no reasons suggests itself as to why compensation for this time is in order. In addition, one of the principal claims of Plaintiffs related to an allegation that Defendants must be advised that they had a right to counsel pursuant to the provisions of § 19.2-158, Code of Virginia (1950), as amended, as a result of being held in jail pending trial. A review of all the pleadings in the case and of the Memorandum of Law submitted by Plaintiffs, as well as argument before this Court, could lead to no other conclusion that that was one of the *major* allegations of the suit, and one which Plaintiffs maintained to the bitter end. Plaintiffs did not prevail on this issue at all, and time spent relating to that issue, undoubtedly not an inconsiderable portion, should not be compensated. *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394, 411 (D.Md. 1974), *aff'd* 520 F.2d 871 (4th Cir. 1974). In addition, Plaintiff Allen complained, as a major issue, of having received a jail sentence for an offense for which incarceration was not provided by law. The Court appropriately granted no relief on this issue, and, thus, it cannot be said that Plaintiffs prevailed on this issue.

This Court should direct, therefore, Plaintiffs to allocate time spent on the case towards only on the issues on which they prevailed.

In addition, a considerable number of hours was spent in travel. Such work should be compensated for at a lower rate. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

2. Novelty and Difficulty of the Questions Raised. The legal issue raised was relatively a novel.

3. Skill Required to Perform the Legal Services Rendered. The case was presented in a normal fashion.

4. THE ATTORNEY'S OPPORTUNITY COSTS IN PRESSING THE INSTANT LITIGATION. None appears.

5. THE CUSTOMARY FEE FOR LIKE WORK. As indicated by this Court in *Orpiano,* attached, trial work of this type commands a fee of $30.00-$75.00 per hour. Plaintiffs' request for $60.00 is totally unreasonable in light of the experience of counsel and in light of fees charged for similar work by attorneys of much greater experience in the City of Charlottesville. Plaintiffs' request does not reflect the experience of counsel as it must. *Johnson, supra.* Unless the request is greatly reduced, Defendants will request the Court to set the matter for hearing or permit the taking of depositions to be considered by this Court as evidence.

6. THE ATTORNEY'S EXPECTATION. The attorney in this case ran the risk of obtaining no award at all.

7. TIME LIMITATION IMPOSED BY THE CLIENT OR CIRCUMSTANCES. None appears.

8. THE AMOUNT IN CONTROVERSY AND THE RESULTS OBTAINED. Plaintiffs sued only for injunctive and declaratory relief.

9. EXPERIENCE, REPUTATION AND ABILITY OF LAWYER. It is understood that Plaintiffs' attorney has been at the Bar approximately three years. What experience she has is unknown.

10. UNDESIRABILITY OF CASE WITHIN LEGAL COMMUNITY. None would appear.

11. NATURE AND LENGTH OF PROFESSIONAL RELATIONSHIP BETWEEN CLIENT AND CLIENT. It would appear that this is a one time affair.

12. ATTORNEYS IN SIMILAR CASES. As hereinbefore indicated, a normal fee would range from $40.00 to $75.00. A fee of $40.00 would be deemed reasonable by Defendants.

13. Costs. Costs appeared to be normal, except for the above referred to trip to Alexandria.

Linwood T. Wells, Jr.
Assistant Attorney General
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Richmond, Virginia 23219

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ORDER

Entered July 6, 1981

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the following attorney's fees and disbursements are allowed as costs in this action and are awarded against the defendant Gladys Pulliam, Magistrate for the County of Culpeper, Virginia:

Attorney's fees	$7,308.00
Costs	383.09
Total	$7,691.09

/s/ Albert V. Bryan, Jr.
United States District Judge

MEMORANDUM OPINION

This action is again before the court on plaintiff's request for an award of costs, including attorney's fees, pursuant to 42 U.S.C. § 1988 and as directed by the court in its June 4, 1981 order.

The request is for $7,308.00 in attorney's fees and $383.09 in disbursed costs. The disbursed costs are not objected to, except for one trip to Alexandria, and they will be allowed, including that item. The attorney's fee is objected to as being calculated at a rate of $60.00 per hour instead of $40.00 per hour, the latter figure being defendants' assertion of what is reasonable. The number of hours

expended by plaintiffs' counsel are not contested or deemed unreasonable by defendants except, again, for six hours expended for a trip to Alexandria to obtain an *in forma pauperis* order and to file the suit. Defendants assert that this could have been accomplished by mail, and that is probably correct. However it is not unreasonable for counsel to want the first contact with the court to be in person, to answer on the spot any questions the clerk might have, to correct any mechanical deficiences in the filing immediately, and to get permission to file *in forma pauperis* and the filing of the complaint itself all done at once. Nor do there seem to be a proliferation of trips to Alexandria—there were only four —and the mails seems to have been resorted to frequently. The contested time spent for the trip to Alexandria will be allowed as reasonable.

The defendant also contests an allowance for any time spent on issues on which the plaintiffs did not prevail, namely, plaintiffs' asserted right to counsel and relief for the plaintiff Allen. It is true that the right to counsel issue was not reached by the court, but if the defendants' position, which was that it *was* proper to incarcerate for failure to make bail, persons charged with non-jailable offenses, had prevailed, then clearly the right to counsel would have become a major issue in the case. In disagreement with the defendants, however, the court concludes that it was not one of the major issues in the case. But even if it was, it was not a frivolous issue, and as indicated it could have become a major issue. Moreover, and this is also the case with respect to the relief for the plaintiff Allen, plaintiffs' counsel ought not to be penalized for asserting substantial issues in an action, merely because they were not completely successful on all issues. Otherwise counsel in cases such as this might become too timid to assert substantial

issues for fear that they would not be compensated for the time spent on them if they were not entirely successful. In any event, the two issues mentioned were intimately connected with the principal issue, namely, whether persons could be incarcerated for non-jailable offenses solely because of an inability to make bond. On this principal issue the plaintiffs clearly prevailed, and the time spent on related issues will be allowed as reasonable and necessary.

The factors to be considered by the court in allowing attorney's fees are outlined in *Barber* v. *Kimbrell's, Inc.*, 557 F.2d 216, 226 (4th Cir. 1978), and the court will consider them in order:

1. *The time and labor expended.* As pointed out previously, the court finds the number of hours and costs to be reasonable and necessary, and, indeed, with the one exception noted the defendants do not contest them. While the case did not go to trial, but was resolved on summary judgment, it is apparent that interviewing witnesses, conferences, written submissions, and appearances in court were time consuming. None of the time spent appears wasteful.

2. *The novely and difficulty of the questions raised.* The case was a novel one and involved serious, although basic, constitutional questions.

3. *The skill required to perform properly the legal services rendered.* There was a skillful marshalling and presenting of the case by counsel. The written submissions were concise and expertly prepared and the constitutional issues thoroughly researched.

4. *The attorneys' opportunity costs in pressing the instant litigation.* While there is no evidence that acceptance of this particular lawsuit precluded plaintiffs' attorney from accepting any specific other engagement, there is no ques-

tion that a substantial amount of time was required—time that the attorney was not free to use for other purposes.

5. *The customary fee for like work.* Inquiry and the court's experience in these cases reveal that trial work of this type in this area commands a fee of $50.00-$100.00 per hour. The attorney for the plaintiffs customarily charges $75.00 per hour for her time.

6. *The attorney's expectations at the outset of the litigation.* The fees here were contingent, i.e., the attorney was only to be paid if the plaintiffs prevailed. Consequently the attorney ran the risk of getting nothing. While perhaps this should not enlarge the amounts requested, it as a factor certainly weighs against any reduction in the amount requested.

7. *Time limitations imposed by the client or circumstances.* There is no evidence that the client or circumstances imposed any time limitation on the attorney.

8. *The amount in controversy and the results obtained.* While no monetary damages were sought or recovered, the result obtained was excellent. Liability was vigorously contested. Moreover the result obtained, which proscribes future conduct of the defendants, inures to the benefit of others in plaintiffs' circumstances.

9. *Experience reputation and ability of counsel.* Plaintiffs' counsel is a relatively inexperienced member of the bar. Her requested hourly rate, in the lower portion of the range of fees for this type of work, reflects this. Yet she made a thoroughly professional and imaginative presentation, equal to that of many more experienced practitioners. The record does not indicate that she has had experience in this type of case before.

10. *The undesirability of the case within the legal community in which the suit arose.* This case is not undesir-

able from the point of view of the community or counsel's contemporaries.

11. *The nature and length of the professional relation between attorney and client.* There is no evidence that this is anything except a single instance of representation of these plaintiffs by this attorney.

12. *Attorney's fees awarded in similar cases.* Fees in these cases range from a minimum of $50.00 per hour to a maximum of approximately $100.00 per hour, with an occasional bonus. Cases in which the lower range was awarded usually involved instances where there was a proliferation of attorneys, where the result obtained was minimal or where the case clearly had been overtried or time clearly wasted on unnecessary efforts. None of these factors is present here. Lawyers with minimal experience generally have received fees in the lower range; and the fee request here, by comparison with those the court sees for comparable cases, can only be described as modest.

For the foregoing reason the court includes that the requested fee of $60.00 per hour, or $7,308.00, should be allowed in full.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1781

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Appellees,

v.

BASIL C. BURKE, JR., Judge of the
General District Court for the
County of Culpeper, Virginia,

Defendant,

and

GLADYS PULLIAM, Magistrate for the
County of Culpeper, Virginia,

Appellant.

ERVIN, Circuit Judge:

Gladys Pulliam, Magistrate for Culpeper County, Virginia, appeals from an order of the district court awarding $7,308.00 in attorney fees against her pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Pulliam contends that, as a judicial officer, she is absolutely immune from an award of attorney fees. In the alternative, she contends that the district court abused its discretion by awarding excessive attorney fees.

We hold that judicial officers are not immune from an award of attorney fees in an action in which prospective relief is properly awarded against a judicial officer. We also hold that the attorney fees awarded by the district court

were reasonable in this case. The order of the district court, therefore, is affirmed.

I.

On January 10, 1980, Richmond R. Allen was arrested in Culpeper County, Virginia, on a charge for which incarceration is not authorized under Virginia law.[1] Magistrate Pulliam incarcerated Allen until his trial fourteen days later, however, solely because he was not able to meet $250.00 bail.[2] He was not advised of his right to appointed counsel or taken before a judge[3] until his trial before the Honorable Basil C. Burke, Jr. in the General District Court of Culpeper County.

Allen subsequently brought a 42 U.S.C. § 1983 action against Magistrate Pulliam and Judge Burke in which he sought declaratory and injunctive relief. He alleged that he had been incarcerated for a non-incarcerable offense and denied his right to counsel in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments.[4]

The district court declared unconstitutional the practice of incarcerating persons for non-incarcerable offenses solely for failure to meet bail and granted injunctive relief against

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[1] Allen was arrested for using abusive language in violation of Va. Code § 18.2-416. Such an offense is a Class 3 misdemeanor for which the maximum penalty is a $500.00 fine.

[2] The magistrate regularly incarcerated persons charged with Class 3 and Class 4 misdemeanors if they could not meet bail, even though such offenses are not punishable by incarceration.

[3] Va. Code § 19.2-158 requires that an accused who is incarcerated be brought before a trial judge on the first day the judge sits after the accused is incarcerated.

[4] The court subsequently granted a motion allowing Jesse W. Nicholson to intervene. Nicholson had been charged with a Class 4 misdemeanor and incarcerated when he was not able to meet bail.

Magistrate Pulliam, in her official capacity.[5] Because the court found that incarceration was unconstitutional in the first instance, it did not reach the issues concerning Allen's rights following incarceration.

Allen subsequently filed a request for $7,308.00 in attorney fees and costs pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The request was based on the actual hours spent on the case calculated at an hourly rate of $60.00.

Magistrate Pulliam filed an objection to the request on the ground that it was excessive. She argued that (1) the fees requested should have been based only on the work performed on the issues decided in Allen's favor and not for work on the issues never reached by the court; (2) an hourly rate of $60.00 was excessive; and (3) the request included an unnecessary six-hour trip to Alexandria, Virginia, to file a complaint.

The district court awarded the requested fees, finding that (1) although the first appearance and right to counsel issues were not central to the case, they could have been important had Allen lost on the first issue; (2) an hourly rate of $60.00 was reasonable because there were serious constitutional issues involved, the claim was novel, and the case was handled skillfully by Allen's counsel; (3) none of the time spent appeared to be wasteful; and (4) the time alloted for filing the complaint and acquiring permission to proceed *in forma pauperis* was not unreasonable. The court further noted that the case was a contingency case, which weighed against any decrease in what the court described as the "modest" amount requested.

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[5] The district court dismissed Judge Burke as a defendant, finding that his involvement in the unconstitutional incarceration was insignificant.

II.

Although judges and prosecutors are absolutely immune from liability for money damages, *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Pierson* v. *Ray*, 386 U.S. 547 (1967), this court has held, in *Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom. Leeke* v. *Timmerman*, 102 S.Ct. 69 (1981),* that judicial immunity does not extend to injunctive and declaratory relief under 42 U.S.C. § 1983. *Accord, Heimbach* v. *Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Harris* v. *Harvey*, 605 F.2d 330, 335 n.7 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); *Kelsey* v. *Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978); *Shipp* v. *Todd*, 568 F.2d 133, 134 (9th Cir. 1978). The question presently before us is whether a judicial official is liable for attorney fees under 42 U.S.C. § 1988 when judicial immunity is not a bar to prospective relief.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that in any action under 42 U.S.C. § 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *See Hutto* v. *Finney*, 437 U.S. 678, 694 (1978). In *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 738-39 (1980), the Supreme Court held that attorney fees may be recovered against an official under 42 U.S.C. § 1988 when prospective relief is properly awarded against the offi-

* The extent of the Supreme Court's discussion of judicial immunity in *Leeke* v. *Timmerman*, 102 S.Ct. 69 (1981), is a footnote in which the Court acknowledged that the Fourth Circuit had held that a state magistrate was not immune from declaratory and injunctive relief. *See id.* at 71 n.1.

cial.[7] The Court found, on the basis of the legislative history of § 1988, that Congress intended for attorney fees to be awarded under § 1988 to claimants who obtain prospective relief against an official but who otherwise are barred from recovering damages against the official. *Id.* Indeed, the House Report states:

> Furthermore, while damages are theoretically available under the statutes covered by (§ 1988), it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severly limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularily important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 1558, 94th Cong., 2nd Sess. 9 (1976).[8]

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[7] In *Consumers Union*, two citizens groups sued the Supreme Court of Virginia for promulgating and enforcing an unconstitutional state bar disciplinary rule that prohibited attorneys from advertising. The Supreme Court held that the Virginia court was absolutely immune from both damage liability and prospective relief in its legislative capacity, but that in its enforcement capacity, it was not immune from prospective relief, and the concomitant award of attorney's fees. The Court refrained from considering whether judicial immunity is a bar to prospective relief under § 1983. 446 U.S. at 735-36. The Court noted, however, that it had never held that judicial immunity adsolutely insulates judges from declaratory or injunctive relief, and that the Court previously has granted injunctive relief against state judges in cases where the issue of judicial immunity was not raised. *Id.* at 735 n.14 (citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *Mitchum* v. *Foster*, 407 U.S. 225 (1972)). Although the Supreme Court has never held that judicial immunity is not a bar to prospective relief, it is the law in this circuit. *See Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom. Leeke* v. *Timmerman*, 102 S.Ct. 69 (1981).

[8] In *Pierson* v. *Ray*, 386 U.S., 547 554-55 (1967), the Supreme Court indicated that Congress has the power to abrogate judicial immunity. Footnote 17 of the House Report contains a citation to

We hold, therefore, that a prevailing party may recover attorney fees against a judicial official under 42 U.S.C. § 1988 when prospective relief is properly awarded against the official. *See Morrison* v. *Ayoob*, 627 F.2d 669, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). Because prospective relief was properly awarded against Magistrate Pulliam, *see Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub. nom. Leeke* v. *Timmerman*, 102 S.Ct. 69 (1981), Allen was entitled to an award of attorney fees under 42 U.S.C. § 1988.

III.

Magistrate Pulliam further contends that the amount of attorney fees under 42 U.S.C. § 1988 was excessive. We disagree.

This court has recognized that the allowance of attorney fees " 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong.' " *Barber* v. *Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (quoting *United States* v. *Anglin & Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944), *cert. denied*, 324 U.S. 844 (1945). The facts and circumstances to be considered by the district court in determining reasonable attorney fees include:

Pierson v. *Ray*, which further suggests that Congress intended to allow an award of attorney fees against an official despite immunity from damage liability. *See Morrison* v. *Ayoob*, 627 F.2d 669, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. *Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978). Because we recognized that "merely providing a checklist of factors to consider does not lead to consistent results or, in many cases, reasonable fees," we articulated a method for applying these factors in *Anderson* v. *Morris*, 658 F.2d 246, 249 (4th Cir. 1981) (quoting *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 642 (6th Cir. 1979)). The district court initially should multiply the number of hours reasonably expended ("time and labor expended") by the customary hourly rate ("customary fee for like work") to establish a preliminary amount for the fee award. The court then should consider the other factors and adjust the fee accordingly. 658 F.2d at 249.

In this case, the district court reviewed each of the twelve factors and determined that the $7,308.00 attorney fee requested by Allen was "modest" in light of the fact that the case was novel, involved serious constitutional questions, was skillfully presented by counsel, and was

taken on a contingency basis.[9] We have reviewed the record and concluded that, under all the facts and circumstances, the attorney fee awarded by the district court in this case was entirely reasonable. Accordingly, the district court's award of attorney fees is affirmed.

IV.

For the foregoing reasons, the award of attorney fees by the district court is affirmed.

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[9] Because this case was decided before *Anderson* v. *Morris, supra,* the district court did not have the benefit of that case. The attorney fee awarded by the district court, however, essentially was determined in the manner prescribed by *Anderson* v. *Morris.* Allen's request for $7,308.00 in attorney fees was based on the actual hours spent calculated at an hourly rate of $60.00. The district court determined that all of the hours submitted were reasonably expended and that an hourly rate of $60.00 was reasonable in light of the fact that the customary hourly rate for such a case was between $50.00 and $100.00.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1781

RICHMOND R. ALLEN, et al,

Appellees,

v.

GLADYS PULLIAM, etc.,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and a majority of judges in active service did not vote in favor of the suggestion for rehearing en banc.

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin.

For the Court,
/s/ WILLIAM K. SLATE, II
Clerk

November 29, 1982

Opposition

No. 82-1432

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GLADYS PULLIAM, Magistrate for
the County of Culpeper,

Petitioner,

versus

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ATTORNEY FOR RESPONDENTS

QUESTION PRESENTED

I. Whether attorneys fees pursuant to 42 U.S.C. §1988 can be awarded when prospective relief has been granted against a magistrate who would be immune from a damage award?

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No. 82-1432

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GLADYS PULLIAM, Magistrate for
the County of Culpeper,

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versus

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is set forth in Appendix A to the Petition for Writ of Certiorari. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at Allen v. Burke, 690 F. 2d 376 (4th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1982. A Petition for rehearing en banc was denied November 29, 1982. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. §1988, as amended by the Civil Rights

Attorney's Fees Award Act of 1976, 90 Stat. 2641, provides, in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Respondents sought declaratory and injunctive relief against Petitioner to prevent Petitioner from again incarcerating persons pending trial for non-incarcerable offenses. Respondent Allen had been incarcerated by Petitioner for fourteen days upon being arrested for cursing and abusing, a Virginia crime for which the maximum penalty was a fine. Respondent Nicholson had been frequently incarcerated for non-incarcerable offenses, including at least once during the pendency of the District Court action.

The District Court declared the practice unconstitutional and granted injunctive relief, which relief was not appealed by Petitioner. The District Court then entered an award of attorneys fees pursuant to 42 U.S.C. §1988, and Petitioner appealed the award of attorneys fees to the Fourth Circuit Court of Appeals, which affirmed the award.

REASON FOR DECLINING THE WRIT

This Court has already recognized that attorneys fees can be awarded pursuant to 42 U.S.C. §1988 against defendants immune from damage awards.

Judicial immunity with its long history set forth by Petitioner is not an issue in this case. Petitioner cites this Court's recognition in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) that the Circuits are not in agreement as to whether judicial immunity applies to prospective relief or only damages awards. However, in the present case, prospective

relief was granted and Petitioner did not appeal from this relief and does not contest its propriety before this Court.

Thus, the only question is whether Congress, which can abrogate or maintain common law immunities in its civil rights legislation as it deems appropriate, see, e.g. Pierson v. Ray, 386 U.S. 547 (1967) (determining from legislative history that Congress did not intend to abrogate judicial immunity from damage suits but recognizing Congress' power to do so), has made 42 U.S.C. §1988 attorneys fees awardable when prospective relief has been entered against a defendant immune from a damages award. This Court has answered this question in the case of Supreme Court of Virginia v. Consumers Union, supra, stating to the point:

> The House Committee Report on [42 U.S.C. §1988] indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards.

Id. at 738-39.

The House Committee Report elucidated that "awarding counsel fees to prevailing parties in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." H.R.Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976).

Thus, the single question presented to this Court has been answered by this Court, the Fourth Circuit Court of Appeals decided in harmony with that answer, and the Writ should be denied. Nixon v. Fitzgerald, __U.S.__, 73 L.Ed. 2d 439 (1982) has no bearing on this issue.

CONCLUSION

This Court has already recognized that 42 U.S.C. §1988 is intended to allow attorney fee awards against a defendant who is immune from damage awards. Prospective relief was granted in this case, the propriety of this relief has never been questioned

on appeal or in Petitioner's Petition for Writ of Certiorari, and the decision of the Fourth Circuit Court of Appeals affirming the award of attorneys fees is correct. Accordingly, the Writ should be denied.

RICHMOND R. ALLEN and
JESSE W. NICHOLSON

By Counsel

Deborah C. Wyatt
Wyatt, Rosenfield & Green
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Charlottesville, Virginia 22901

AFFIDAVIT OF SERVICE

I, Deborah C. Wyatt, being duly sworn, do hereby state that on or before this 23rd day of March, 1983, I caused this Brief in Opposition, along with the accompanying Motion for Leave to Proceed In Forma Pauperis and Affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further state that on or before this 23rd day of March, 1983, I caused a copy of each of these documents to be sent to William G. Broaddus, attorney for Petitioner, Office of the Attorney General, 101 North 8th Street, Richmond, Virginia 23219, by depositing the same in a United States Post Office or mailbox, with first class postage prepaid.

Deborah C. Wyatt

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Deborah C. Wyatt on this 23rd day of March, 1983.

Louise N McLaughlin
Notary Public

My commission expires: June 3, 1984.

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No. 82-1432

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper,

Petitioner,

versus

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Come now the Respondents, Richmond R. Allen and Jesse W. Nicholson, by their undersigned counsel, and hereby move this Honorable Court for leave to proceed in forma pauperis. In support they submit their affidavits attached hereto and represent that they have been granted leave to proceed in forma pauperis in the courts below including the United States District Court for the Eastern District of Virginia, Alexandria Division, and the Fourth Circuit Court of Appeals, to which a Writ of Certiorari is being sought by Petitioner.

Respectfully submitted,

RICHMOND R. ALLEN and
JESSE W. NICHOLSON

By Counsel

Deborah C. Wyatt
Wyatt, Rosenfield & Green
917 East Jefferson Street
Charlottesville, Virginia 22901
(804) 296-4138

No. 82-1432

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GLADYS PULLIAM, Magistrate for
the County of Culpeper,

Petitioner,

versus

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Deborah C. Wyatt, Counsel for Respondents, having been duly sworn, depose and say as follows:

1. That I have not had contact with my clients for the last several weeks;

2. That to the best of my knowledge and belief the status of my clients remains as paupers, which status was granted in both the District Court and the Court of Appeals below; and

3. That to the best of my knowledge and belief, the allegations of the Affidavits which are attached but not yet signed are true.

DEBORAH C. WYATT

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Deborah C. Wyatt on this 23rd day of March, 1983.

Louise N. McLaughlin
Notary Public

My commission expires: June 3, 1984.

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RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Richmond R. Allen, having been duly sworn, depose and say as follows:

1. I am a Respondent in the above-titled case;

2. I am currently unemployed and have been so for the majority of the last two years;

3. I have no source of income and I live on the charity of others;

4. I do not own any real property or an automobile; and

5. Because of my poverty, I am unable to pay fees and costs associated with the above-titled action.

_____
RICHMOND R. ALLEN

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Richmond R. Allen on this ____ day of March, 1983.

_____
Notary Public

My commission expires:_____.

No. 82-1432

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Jesse W. Nicholson, having been duly sworn, depose and say as follows:

1. I am a Respondent in the above-titled case;

2. I am currently unemployed and have been so for the majority of the last two years;

3. I have no source of income and I live on the charity of others;

4. I do not own any real property or an automobile; and

5. Because of my poverty, I am unable to pay fees and costs associated with the above-titled action.

_____
JESSE W. NICHOLSON

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Jesse W. Nicholson on this ____ day of March, 1983.

_____
Notary Public

My commission expires:_____.

Amicus Brief

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No. 82-1432

IN THE

Supreme Court of the United States

October Term, 1982

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Petitioner,

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RICHMOND R. ALLEN, and JESSE W. NICHOLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND THE MINNESOTA SUPREME COURT, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND THE MINNESOTA SUPREME COURT, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The State of Minnesota and its Supreme Court, through the Minnesota Attorney General, respectfully offer this brief as amici curiae, in support of the petition for a writ of certiorari. As the highest court of the State of Minnesota, the Minnesota

Supreme Court has inherent supervisory authority over the conduct of proceedings in all courts of the State, and has appellate jurisdiction for the correction of any constitutional errors which they may commit. If the construction of 42 U.S.C. § 1988 adopted by the Court of Appeals in this action is upheld, the judges of the courts of Minnesota will become potentially liable for substantial awards of attorney's fees in actions brought under 42 U.S.C. § 1983. The Minnesota Attorney General, as the chief legal officer of the State, has responsibility for defending those actions.

Contrary to this Court's prediction that there are not likely to be many cases entailing the assessment of attorney's fees against judges,[1] there have been a number of cases in Minnesota alone potentially raising that question in recent years. During 1982 six separate actions were commenced against Minnesota judges under 42 U.S.C. § 1983. Since the enactment in 1976 of 42 U.S.C. § 1988, which authorizes awards of attorney's fees, members of the Minnesota judiciary have been sued under the federal Civil Rights Act on approximately 40 occasions. The trials of two of those cases are still pending, and the assessment of attorney's fees is at issue in both.

For all of the above reasons, the *amici* have a substantial and continuing interest in the instant matter.

---

[1] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 735 n.13 (1980).

SUMMARY OF ARGUMENT

From the earliest days of the common law, judges have been held absolutely immune from civil liability for their judicial acts, in recognition of the destructive effect which harassing suits and potential liability would have on the independence of the judiciary. To award attorney's fees against judges under 42 U.S.C. § 1988 would be equally destructive, and would inhibit fearless and independent decision-making. Such a result should not lightly be imputed to Congress, and neither the statute on its face nor the legislative history manifests an intention to abrogate this ancient and honored doctrine. Moreover, the concerns which gave rise to judicial immunity are fully applicable to actions for declaratory and injunctive relief, and, in the absence of a clear congressional intent to discard that immunity, judges should be held immune from § 1983 actions for prospective relief. The reasons for barring attorney's fees awards under the principle of judicial immunity are as sound as those for doing so under the doctrine of legislative immunity.

ARGUMENT

I. JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AGAINST JUDGES UNDER 42 U.S.C. § 1988.

This case presents the important and unresolved question whether attorney's fees under 42 U.S.C. § 1988 may be awarded against a judge acting in his judicial capacity. The Court of Appeals for the Fourth Circuit has in this case approved such an award. This ruling threatens the independence of state judges and is contrary to the deeply-rooted policies which underlie the principle of judicial immunity.

As this Court has often observed, the absolute immunity of judges for acts committed within their judicial jurisdiction has roots extending to the earliest days of the common law; few doctrines are more solidly established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 418, 422, n.20 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). From this Court's adoption of the immunity doctrine, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), to its pronouncement in *Dennis v. Sparks*, 449 U.S. 24 (1980), the purpose of immunizing judges has been clearly stated: "the point . . . is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, 203-204 (1979). As stated in *Sparks, supra*:

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that

> the judge acted not only mistakenly but with malice and corruption.

Dennis v. Sparks, 449 U.S. at 31 (citations omitted). To allow attorney's fees against judges would be to defeat this purpose; to distinguish between attorney's fees awards and damage awards is to ignore the rationale of judicial immunity. Attorney's fee allowances would inescapably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.) *cert. denied* 339 U.S. 949 (1950).

The threat of a $50,000 award for attorney's fees is no less disconcerting to a potential defendant than is the threat of a $50,000 award for damages. An award against a judge in his individual capacity, if it were not barred by judicial immunity, would probably be paid in practice from public funds. *Cf. Hutto v. Finney*, 437 U.S. 678 (1980). This is the case because many states, including Minnesota, authorize the indemnification of public officers for liabilities unintentionally incurred by them in good faith in the course of their duties. *See, e.g.*, Minn. Stat. § 3.736, subd. 9 (1978). Moreover, the suggestion that judges would be unaffected by awards against the funds of their offices does scant justice to their sense of public responsibility. The prospect of large, if not crippling, fee awards against the public funds with which they are entrusted would be profoundly disturbing to all conscientious jurists. This concern would be heightened both by the dramatic proliferation of § 1983 suits in recent years, and by the fact that attorney's fee awards of $50,000 and more are becoming commonplace. Only the most sanguine observer would insist that such a continuing risk would not influence judicial decision-making if only subtly and subconsciously.

This intimidating influence would be enhanced by the fact that fee awards under § 1988 are to be collected "*either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).*" S. Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976), U.S. Code Cong. & Admin. News (1976), 5908, 5913 (emphasis added). Unlike heads of sprawling governmental departments, judges do not typically have at their disposal vast budgets capable of absorbing unforeseen costs of this magnitude. Instead, the effect of imposing fee awards would be to send state judges, hat in hand, to legislatures for a special appropriation to pay each fee award.

That costs such as attorney's fees can indeed affect officials' decision-making is demonstrated by this Court's own decision in *Hutto v. Finney*, 437 U.S. 678 (1978).[2] There, this Court described attorney's fees as one of the "financial penalties" which may be used as "effective enforcement weapons" to elicit compliance with an injunction. *Id.*, 437 U.S. at 690. The Court noted that "the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation." *Id.*, 437 U.S. at 695, n.24. Because this "weapon" can indeed shape the actions of officials, even when fees are awarded against public funds, it would be disingenu-

[2] Hutto v. Finney, *supra*, held that the Eleventh Amendment does not bar an award of attorney's fees against a State in conjunction with the issuance of declaratory and injunctive relief. The absence of such an Eleventh Amendment bar, however, offers no guidance in determining whether, as against judicial officers, there remains a bar of judicial immunity. The policies of federalism which inform Eleventh Amendment analysis are also present here, because § 1983 actions would place federal courts in the position of enjoining state judges, but the policies which give rise to judicial immunity are entirely distinct, and are independent of the concerns considered in Hutto.

ous to assert that the prospect of such costs will not have an intimidating effect.

Should § 1988 be read, then, as abrogating judicial immunity? Such an abrogation is not lightly to be inferred. *Pierson v. Ray, supra*; *Bauers v. Heisel, supra*; *cf. Tenny v. Brandhove*, 341 U.S. 367 (1951). Judicial immunity is so firmly established that this Court concluded in *Pierson v. Ray, supra*, 386 U.S. at 554, 555, that "Congress would have specifically so provided had it wished to abolish the doctrine."

In this area, where the immunity in question is so deeply-rooted, and where sensitive issues of federalism are implicated, the Court should not infer an abrogation of immunity in the absence of explicit statutory language.[3] Here, the statute contains no such language. Instead, the Court of Appeals looked to the legislative history, and relied on a single paragraph in the House Report stating that counsel fees are to be available "in some cases, [where] immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H. Rep. No. 94-1558, 94th Cong., 2d Sess., 9 (1976). *See* Appendix C at 31, Petition For Writ of Certiorari. The Report contains no express reference to judicial immunity, but the Court of Appeals inferred an intent to abrogate that immunity from the general reference to "immunity doctrines" and from the Report's citation of *Pierson v. Ray, supra.*

Ironically, it is the *Pierson* case which establishes that an intent to abolish judicial immunity must be expressly stated. Surely, if Congress had intended such an abrogation,

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[3] Cf. Hutto v. Finney, *supra*, 437 U.S. at 706 (Powell, J., concurring in part and dissenting in part). See also Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv.L.Rev. 682, 695 (1976).

the citation to *Pierson* is evidence of its awareness of the need to do so explicitly. Because *Pierson* involved not only a judge, but also police officers, and established the "special defenses" of good faith and probable cause for police officers, the House Committee's citation to *Pierson* is at most ambiguous, and can equally be understood as referring to these "special defenses." Something more than this is required to abolish or restrict a principle so deeply rooted in our history and so essential to an independent judiciary.

II. THE RATIONALE FOR ABSOLUTE LEGISLATIVE IMMUNITY BARRING PROSPECTIVE RELIEF AND ATTORNEY'S FEES AWARDS APPLIES WITH EQUAL FORCE TO JUDICIAL IMMUNITY.

Because the policies supporting judicial immunity in damage actions are equally applicable to an award of attorney's fees, such an award is barred by immunity, whether or not judges are absolutely immune from suits for prospective relief under § 1983. Thus, the Court need not reach the question—which it has not addressed, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735 (1980), whether judicial immunity bars declaratory or injunctive relief. If the Court does reach the issue, however, the considerations which give rise to judicial immunity from other civil actions, and to the absolute immunity of legislators, are equally apposite, and compel the conclusion that judicial immunity from civil suits is absolute. Where such absolute immunity exists, there can be no award of attorney's fees. *Supreme Court of Virginia v. Consumers Union, supra*, 446 U.S. at 732-33.

The *Consumers Union* decision reestablished the principle that public officials who act in legislative capacities are ab-

solutely immune to suits for damages *and* declaratory and injunctive relief. *Id.* From that principle comes the conclusion that legislative immunity also prohibits awards of attorney's fees. This Court now has an opportunity to answer the question of whether it is sensible to place the doctrine of judicial immunity at level lower than that of legislative immunity on the issue of attorney's fees. Amici suggest that there are compelling reasons to give judicial immunity the same breadth as legislative immunity.

The rationale of this Court's judicial immunity decisions supports the view that judicial immunity, like legislative immunity, extends to all civil suits, regardless of the nature of the relief sought. *See e.g., Conover v. Montemuro*, 477 F.2d 1073, 1104 (3d Cir. 1973) (Aldisert, J., concurring); *Zimmerman v. Spears*, 428 F. Supp. 759, 761 (W.D. Tex. 1977); *Mirin v. Justices of Supreme Court of Nevada*, 415 F. Supp. 1178 (D. Nev. 1976); *Atchley v. Greenhill*, 373 F. Supp. 512, 514, 515 (S.D. Tex. 1974), *aff'd.* 517 F.2d 692 (5th Cir. 1975) *cert. den.*, 424 U.S. 915 (1976); *Smallwood v. United States*, 358 F. Supp. 398, 403 (E.D. Mo. 1973), *aff'd.* 468 F.2d 1407 (8th Cir. 1978); *Mackay v. Nesbitt*, 285 F. Supp. 498, 502, 503 (D. Alaska 1968), *aff'd.* 412 F.2d 846 (9th Cir. 1969), *cert. denied* 396 U.S. 960 (1969).

In case after case, this Court has emphasized that judicial immunity is necessary to protect judges against the harassing and intimidating influence of being compelled to defend themselves in vexatious civil actions. This burden inheres in any civil action, regardless of the nature of the relief sought or the ultimate outcome of the case. Judicial immunity reflects the conviction that a judge:

> . . . should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corrup-

> tion. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, supra, 386 U.S. at 554.

Similarly, in *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 347, this Court stated that "[l]iability to answer to everyone who might feel himself aggrieved by the action of the judge . . . would destroy that independence without which no judiciary can be either respectable or useful." Judicial immunity is thus a response to concern that:

> harassment by unfounded litigation would cause a deflection of the [judge's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler v. Pachtman, supra, 424 U.S. at 422, 423 (referring to prosecutors, and to the common concerns justifying the immunity of prosecutors, judges and grand jurors). This danger is completely independent of the nature of the civil action, or its final disposition. Even if a judge is certain of ultimate vindication, and thus is free from personal financial consequences, the risk of having to *defend* a suit may nevertheless be a substantial deterrent to fearless action. *Cf. Imbler v. Pachtman, supra,* 424 U.S. at 438, n.4 (White, J., concurring).

In this respect, judges are precisely analogous to legislators. To preserve legislative independence, legislators must be protected "not only from the consequences of litigation's results but also from the burden of defendant themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). State legislators and members of Congress are thus immune from all civil actions, regardless of the relief sought, because " 'a private civil action,

whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' " *Supreme Court of Virginia v. Consumers Union, supra*, 446 U.S. at 733, *quoting Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Even if the relief sought is wholly prospective, private civil actions may be used to delay and disrupt the legislative function. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

Indeed, the potential for distraction, harassment and disruption may be greater in the judicial sphere. Judicial acts are almost always performed in an adversarial setting. It is inevitable that in such circumstances a judge's decision will be adverse to at least one of the litigants. The opportunities for federal civil rights actions against judges are, therefore, substantial.

The case for immunity from prospective relief is stronger in the judicial than in the legislative sphere for another reason. Immunity in general is justified in part by the existence of alternative forums and methods for vindication of individual rights. While few such remedies are available for correction of legislative abuses, "the law has provided for private parties numerous remedies" for the correction of judicial errors. *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 354. Judges, like legislators, are subject to impeachment. *Id.* In many states, they are also accountable at elections. Further, judges are subject to criminal punishment for any willful deprivation of constitutional rights. 18 U.S.C. § 242; *Imbler v. Pachtman, supra*, 424 U.S. at 429. Like prosecutors, they are also subject to profound discipline.

Moreover, apart from proceedings to punish or remove a judge, a disappointed civil litigant or criminal defendant has abundant opportunity to correct judicial errors. Litigants are

not only afforded an initial opportunity for hearing, but also an opportunity to invoke the judge's remedial powers in post-trial proceedings; to pursue an appeal; in criminal cases, to invoke state and federal post-conviction remedies; and, in proper cases, to obtain extraordinary writs. In many instances, the desired relief could also be attained by an action against other defendants, such as enforcement officers, who are not shielded by judicial immunity. *See, e.g., Supreme Court of Virginia v. Consumers Union, supra.*

This wide array of alternative forums makes absolute judicial immunity at least as defensible as the absolute immunity afforded legislators. To authorize further review of a judge's decision in § 1983 actions would in many cases necessitate a virtual retrial of the original action in a new forum, before a new judge. Such a retrial would defeat one of the fundamental purposes of judicial immunity, which is to prevent "the manifest injustice of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment of others." Prosser, *Law of Torts* (Hornbook Series, 4th Ed. 1971) § 132 at 988.[4]

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[4] Further support for this view can be found in this Court's ruling that state legislators are insulated from suits for prospective relief. Supreme Court of Virginia v. Consumers Union, *supra*, 446 U.S. at 733. The ruling was based in part on the fact that the Court's prior pronouncements on the subject had described legislators as immune from "civil liability" without distinguishing between damage actions and injunctive actions. The same observation may be made here. This Court has often described judges as immune from "civil liability," without distinguishing between damage and injunctive "actions." See, e.g. Bradley v. Fisher, *supra*, 80 U.S. (13 Wall.) at 347 (citing the "exemption of judges from civil liability"). In Pierson v. Ray, *supra*, 386 U.S. at 555, n.5, for example, the Court stated flatly that "judicial immunity is a defense to an action under § 1983." As in the Supreme Court of Virginia case, the unqualified language of this Court's prior decisions supports an expansive reading of the scope of judicial immunity.

In addition to the burden of defending civil suits, the remedy of injunctive relief may itself have a chilling influence on judicial independence. Inherent in an injunction are the traditional sanctions for its enforcement, including imprisonment and fines for contempt. *Conover v. Montemuro*, *supra*, (Aldisert, J., concurring). These sanctions, by definition are meant to alter the behavior of the parties against whom they are directed, and they are used both to punish noncompliance and to compensate prevailing litigants. *Cf. Hutto v. Finney*, *supra*. Such sanctions thus hold the same potential for inhibiting forceful decision-making as do damage remedies.

Allowing the Court of Appeals' decision to stand would perpetuate an artificial and formalistic distinction between legislative and judicial immunities without substance.

CONCLUSION

The absolute immunity of judges from civil liability for their decisions is a deeply-rooted principle essential to the integrity and independence of the judiciary. The concerns which give rise to that immunity are as applicable to an allowance of costs as they are to an allowance of damages, and preclude an award of attorney's fees under 42 U.S.C. § 1988. *Amici curiae* join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Court of Appeals.

Dated: March 28, 1983.

Respectfully submitted,

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Petitioner's Brief

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In The

Supreme Court of the United States

October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF ON BEHALF OF PETITIONER

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QUESTION PRESENTED

Does judicial immunity bar the award of attorney's fees pursuant to 42 U.S.C. § 1988 against a member of the judiciary who is sued for actions taken in his judicial capacity?

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In The

Supreme Court of the United States

October Term, 1982

No. 82-1432

GLADYS PULLIAM, Magistrate for
the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, concerning attorney's fees and from which the Petitioner appealed, is not reported and is included in the Joint Appendix at pages 38-42. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued September 22, 1982, is reported as *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982), and a copy appears at pages 43-50 of the Joint Appendix. The Order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on No-

vember 29, 1982. That Order is not reported and a copy is contained in the Joint Appendix at page 51.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1982. A Petition for Rehearing *en banc* was denied on November 29, 1982, although four judges voted in favor of the rehearing *en banc*. The jurisdiction of this Court for issuing the writ of certiorari in this case is grounded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATUTES INVOLVED

Title 42 U.S.C. § 1983 (1981) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Tittle 42 U.S.C. § 1988 (1981), as amended by The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, § 2, 90 Stat. 2641, provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title. . .the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner, a Magistrate in the County of Culpeper, Virginia, was one of two defendants in an action instituted in the United States District Court for the Eastern District of Virginia pursuant to the provisions of 42 U.S.C. § 1983.[1] Plaintiffs sued the Magistrate only in her official capacity and sought injunctive and declaratory relief. Plaintiffs attacked implementation of several statutory provisions of the Code of Virginia relating to pretrial arrest and detention of intoxicated persons.[2] Specifically, they challenged their pretrial detention in jail which the Magistrate had ordered pursuant to the Virginia statutes because they were unable to meet bail. Plaintiffs based their claims upon the fact that no incarceration was authorized upon conviction of the charges on which they were being held.

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[1] This action was dismissed in the trial court as to the other defendant, Judge Burke. Although Judge Burke's name appears in the style of the case in the Court of Appeals, he was not a party to the proceeding in that Court because the plaintiffs did not appeal his dismissal at the trial court level.

[2] Plaintiffs did not use the available remedy under Virginia law of appealing the pretrial detention orders. Such orders may be appealed "successively to the next higher court or judge . . . up to and including the Supreme Court of Virginia or any justice thereof." Va. Code § 19.2-124 (Cum. Supp. 1982); Va. S. Ct. R. 3A:29(c). Nor did they seek habeas corpus relief pursuant to Va. Code § 8.01-654 (Cum. Supp. 1982) or Va. S. Ct. R. 5:5.

The District Court granted injunctive relief and held the Virginia statutes to be unconstitutional as applied to the plaintiffs. (App. 22-32.) The Court further directed that, pursuant to 42 U.S.C. § 1988, Magistrate Pulliam pay an attorney's fee to plaintiffs in the amount of approximately $7,500. (App. 32, 38-42.)

Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit on the ground that she, as a judicial officer, was immune from the award of an attorney's fee under 42 U.S.C. § 1988.[3] The Court of Appeals held that members of the judiciary are not immune from payment of an attorney's fee in an action in which prospective relief was awarded, and the Court refused to disturb its holding when a rehearing was requested. (App. 43-51.)

SUMMARY OF ARGUMENT

The doctrine of judicial immunity is firmly entrenched in Anglo-American jurisprudence. It is based on a recognition that the public has an overriding interest in the orderly administration of justice. This interest can be served only through an independent judiciary. The doctrine of judicial immunity bars all civil actions against judicial officers for acts done in their judicial capacity. Awards of attorney's fees against judicial officers cannot be allowed if the judiciary is to remain free from intimidation, and the public is to continue to rely on the independence of the judiciary.

The tenor of modern society reinforces the need for the continued vitality of the doctrine of judicial immunity. The policies underlying its conception are as compelling today as at earlier periods in our history. Application of the doc-

[3] Petitioner also appealed the attorney's fee award on the ground that it was excessive. That ground is not being pursued in this Court.

trine in this case recognizes the dignity of the judicial branch of government, provides continued protection of the public interest, and allows judicial officers to administer justice to the best of their ability without fear of personal consequence.

Common law immunities cannot be altered or abrogated except by clear legislative action. Congress, in enacting The Civil Rights Act of 1871 and The Attorney's Fees Awards Act of 1976, did not disturb the longstanding principle that judcial officers are immune from civil actions complaining of their judicial acts. Nor did Congress intend that judicial officers should be liable for an award of attorney's fees. The legislative history shows that the common law doctrine of judicial immunity has not been legislatively abolished.

Finally, the Eleventh Amendment to the Constitution bars an award of attorney's fees against a judge sued in his official capacity.

ARGUMENT

I.

A Member Of The Judiciary Is Immune From Civil Actions And Attorney's Fees Awards For Acts Undertaken In His Judicial Capacity.

A.

The History, The Underlying Rationale And The Policies Of Absolute Judicial Immunity Confirm Its Application To Bar An Award Of Attorney's Fees Against A Judge For Acts Undertaken In His Judicial Capacity.

Preliminary Statement

This case concerns the propriety of an award of attorney's fees against a judicial officer arising out of a lawsuit for injunctive and declaratory relief. Because application of the doctrine of judicial immunity precludes awarding

any relief against a judge for acts undertaken in his judicial capacity, it obviously follows that the doctrine will bar an award of attorney's fees in a suit attacking such acts. Therefore, it is important to consider the evolution of the doctrine of judicial immunity and the public's interest in its continued application.

1.

The English Common Law Establishing Judicial Immunity Was Adopted By This Court As The American Rule.

As early as the fourteenth century, English common law accorded absolute immunity to judges of courts of record for acts committed within their judicial capacity. 6 W. Holdsworth, *A History of English Law* 235 (1924). English law recognized that the judges of the realm should not be questioned for any judicial acts undertaken by them unless it was by the King himself. To do otherwise would "tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations. . . ." *Floyd and Barker Case*, 77 Eng. Rep. 1305, 1307 (K.B. 1608).

The issue of judicial immunity was again examined in English law in 1813 by the Court of Common Pleas of Ireland in the widely cited case of *Taaffe* v. *Downes*, 13 Eng. Rep. 15 (P.C. 1813), a case involving a factual setting with striking similarities to the case at bar. In *Taaffe*, the Chief Justice of the King's Bench in Ireland, who had issued a warrant for the arrest of the plaintiff for breach of the peace, was sued by the plaintiff on the ground that there was no basis for the charge for which the plaintiff was incarcerated. The Court of Common Pleas held

that the action would not lie against the Chief Justice for his judicial acts.[4]

Simply stated, the English common law, as it evolved, barred civil actions against the judiciary.

In 1869, this Court had its first occasion to consider the extent to which a judge could be held liable for his judicial acts. In *Randall* v. *Brigham*, 74 U.S. (7 Wall.) 523 (1869), this Court considered whether a suit could be maintained against a state court judge by an attorney-plaintiff who alleged that the judge had wrongfully removed him from the Bar of the State of Massachusetts. Justice Field, writing for the Court, reviewed the history of judicial immunity in the common law of England and acknowledged that, as a general principle, judicial officers were not liable in a civil action for any judicial act done within their jurisdiction.[5] 74 U.S. (7 Wall.) at 535.

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[4] In *Taaffe* v. *Downes*, 13 Eng. Rep. at 23-24, Justice Fox conceded that the act of the Chief Justice was illegal, but Justice Fox believed the possibility of imposing liability was

> so monstrous . . . that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges, — an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.

[5] Justice Field observed in *Randall*, 74 U.S. (7 Wall.) at 536:

> This doctrine [of judicial immunity] is as old as the law, and *its maintenance is essential to the impartial administration of justice*. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of

(Footnote continued on page 8.)

In adopting the English rule of judicial immunity, this Court acknowledged the admonition of *Taaffe* v. *Downes* that, "If you once break down the barrier of [judges'] dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility." 74 U.S. (7 Wall.) at 537-538 (quoting *Taaffe* v. *Downes*). This Court also recognized in *Randall* that the doctrine existed for the sake of the public and not merely for the protection of the judge. 74 U.S. (7 Wall.) at 536.

Three years later, this Court had occasion to strengthen the doctrine of judicial immunity, and it did not hesitate to do so. In *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), this Court confirmed the doctrine embraced in *Randall* v. *Brigham* and declared that judicial immunity is *absolute* and attaches regardless of the alleged motives with which the judicial act is performed.[6]

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), this Court considered a civil action brought against a municipal police judge and others under 42 U.S.C. § 1983. In that case, Chief Justice Warren, speaking for the Court, readily stated: "We find no difficulty in agreeing . . . that Judge Spencer is immune from liability for damages. . . ." 386

> every party imagining himself aggrieved, and be called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts.

(Emphasis added.)

[6] The rationale of *Bradley* was adopted in Virginia in *Johnston* v. *Moorman*, 80 Va. (5 Hans.) 131, 139-140 (1885), which noted that the immunity exists to assure the public that "the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 140 (quoting *Scott* v. *Stansfield*, 3 L.R-Ex. 220 (1868)).

U.S. at 553. Chief Justice Warren next observed for the Court that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." *Id.* at 553-554. Of particular significance to the case at bar was the Court's holding that Congress had not abolished the settled principle of judicial immunity by its enactment of the Civil Rights Act of 1871, 42 U.S.C. § 1983. *Id.* at 554.

More recently, in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), this Court had an occasion to review the application of the doctrine and its earlier holding in *Pierson* v. *Ray* that judicial immunity is applicable to bar suits against judges brought under 42 U.S.C. § 1983. The Court, in *Stump*, did not retreat from its earlier holdings and reaffirmed the doctrine even in a case in which a judge's action resulted in tragic consequences which could not be addressed by any manner of judicial review.[7]

When faced with a question regarding the doctrine of judicial immunity, this Court has never retreated from its first pronouncement that judicial immunity from civil actions is a part of American jurisprudence. This Court has consistently applied the doctrine to the facts of the case before it and held that the judiciary is immune from civil liability for acts done in a judicial capacity. The case at bar contains no circumstances to cause this Court to reverse over one hundred years of its recognized legal precedent.

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[7] As noted in the Statement of the Case, *supra*, p. 3 n.2, the respondents in the case at bar had at least two means under state law by which they could seek prompt judicial review of the Magistrate's action and, by either of those means, obtain relief from any errors committed by the Magistrate.

2.

Judicial Immunity Defeats All Actions Whether For Damages Or Equitable Relief.

While this Court has not been faced with a fact situation requiring application of the doctrine of judicial immunity to an action seeking declaratory and injunctive relief, the Court has never indicated that judicial immunity does not preclude such actions. Both law and logic compel a conclusion that the doctrine applies with equal force in all instances.[8]

This Court has spoken of judicial immunity barring civil actions against judges, stating, "Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction." *Randall* v. *Brigham*, 74 U.S. (7 Wall.) at 523.

The general principle, when applied to a civil action

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[8] As noted in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 735 n.13 (1980), the lower courts are divided on the question whether absolute immunity precludes suits in equity. A substantial number of those cases, however, have concluded that judicial immunity does extend at least to all judicial proceedings challenging a discretionary judicial act. *See, e.g., Baier* v. *Parker*, 523 F. Supp. 288 (M.D. La. 1981); *Coleman* v. *Court of Appeals*, 550 F. Supp. 681, 684 (W.D. Okla. 1980); *Town of Hopkins* v. *Cobb*, 466 F. Supp. 1215 (D.S.C. 1979); *Zimmerman* v. *Spears*, 428 F. Supp. 759, 761 (W.D. Tex. 1977); *Mirin* v. *Justices of the Supreme Court of Nevada*, 415 F. Supp. 1178, 1192 (D. Nev. 1976); *Atchley* v. *Greenhill*, 373 F. Supp. 512, 514-515 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Smallwood* v. *United States*, 358 F. Supp. 398, 403 (E.D. Mo.), *aff'd*, 486 F.2d 1407 (8th Cir. 1973); *Mackay* v. *Nesbett*, 285 F. Supp. 498, 502-503 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); *Gay* v. *Heller*, 252 F.2d 313 (5th Cir. 1958).

But see, e.g., Harris v. *Harvey*, 605 F.2d 330, 335 n.7 (7th Cir. 1979); *Heimbach* v. *Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Jacobson* v. *Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971).

seeking damages relief, led this Court to unequivocally preclude such relief. *See Pierson* v. *Ray; Stump* v. *Sparkman*. The language of the Court makes no distinction between types of relief sought in civil actions. The principle is equally applicable to deny civil actions seeking equitable relief. The threat of being called to account for judicial actions in litigation against a judge, regardless of the relief sought in that litigation, contributes to intimidation and not to principled and fearless decision-making. *Pierson* v. *Ray*, 386 U.S. at 554; *Butz* v. *Economou*, 438 U.S. 478, 512 (1978). As succinctly stated in *Coleman* v. *Court of Appeals*, 550 F.Supp. 681, 684 (W.D. Okla. 1980), "'[T]he purpose of judicial immunity is not served by protecting a judge from actions for damages while exposing him to an action for injunctive relief." Because the sanctions inherent in the injunctive process include imprisonment and fines for contempt, the possibility of intimidation arising from such a situation is at least as pernicious as the threat of a money judgment. *See Conover* v. *Montemuro*, 477 F.2d 1073, 1104 (3d Cir. 1973) (Aldisert, J., concurring).

If this Court allows *either* prospective equitable relief *or* the award of attorney's fees against judges, the Court would eviscerate the doctrine of judicial immunity. Such a ruling and revision of the common law by this Court would curtail judicial freedom from intimidation and encourage numerous lawsuits against judges and quasi-judicial officials.

In contrast to its holding in this case, the Court of Appeals below embraced the decision of judicial immunity in *Segarra* v. *McDade*, ____ F.2d ____, No. 82-6170 (4th Cir. Apr. 26, 1983) and used it to hold an official acting in a quasi-judicial capacity immune from suit and payment of attorney's fees. There, a prisoner sought declaratory and

injunctive relief against a prison official because of the manner in which he discharged his duties as chairman of the prison disciplinary committee, a quasi-judicial body. Indeed, the Court described the suit as "a retaliatory action to an unfavorable evidentiary ruling." Slip op. at 16. Drawing in part on the doctrine of absolute judicial immunity, the Court reversed a nominal damage award, and, in language too clear to be misunderstood, stated, "although the damages awarded may have been nominal, *the potential exposure to paying attorney's fees could be oppressive.*" Slip op. at 6 (emphasis added). In explaining why the defendants were absolutely immune from relief, the Court stated:

> To hold otherwise would be to open the doors of the courthouse to suits that would not only be burdensome, harassing and time-consuming for prison officials who serve on disciplinary committees, but would expose them to a financial risk that could result in their refusing to sit on such committees. This could seriously hamper the proper administration of our prisons.

Slip op. at 16-17. Certainly, the proper administration of justice by members of the judiciary merits equal consideration.

If this Court permits suits seeking declaratory and injunctive relief against the judiciary, there is every reason to believe that litigation against our judges will increase greatly. Much of the staggering increase in federal litigation in recent years has resulted from prisoner initiated litigation.[9] Obviously, prisoners, as well as other unhappy

[9] *See* the thoughtful article by former Solicitor General Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777 (1981); and Administrative Office of the United States Courts, *1981 Annual Report of the Director*, Table 20 at 63.

litigants, will attempt to subject the judge, the one individual perceived by the prisoner as primarily responsible for his incarceration, to harrassing litigation—just as happened in *Segarra* to the prison official who was acting in a quasi-judicial capacity. *See* discussion *supra*, at 11-12.[10] Ingenious pleaders with idle time who seek to use the judicial process as a means of retribution will not be deterred by an inability to claim damages. They will simply fashion their complaints to avoid the bar of immunity if it is so limited.

As echoed throughout this brief, the purpose of judicial immunity is to ensure an independent and unintimidated judiciary. That purpose has been recognized throughout the history of the doctrine. To achieve that purpose, con-

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[10] *Segarra* is not the only case cautioning against possible abuse of the legal system. *See* Chief Justice Burger's concurring opinion in *Nixon* v. *Fitzgerald* in which he stated that litigation processes "are used as mechanisms of extortion [and] [u]ltimate vindication on the merits does not repair the damage," 102 S. Ct. 2690, 2706-2709 (1982), and, in a different context, Justice Powell's dissent in *Maine* v. *Thiboutot*, 448 U.S. 1, 24 (1980), in which he observed, "[T]here is some evidence that 1983 claims are being appended to complaints solely for the purpose of obtaining fees . . . [and] ingenious pleaders may find ways to recover fees in almost any suit against a state defendant."

As Judge Duniway pointed out twenty years ago, prisoners "do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court." *Weller* v. *Dickson*, 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring). For prisoners " 'with much idle time and free paper, ink, law books and mailing privileges, the temptation [to file lawsuits] is especially strong.' " *Dickinson* v. *French*, 416 F. Supp. 429, 433 (S.D. Ala. 1976) (quoting *Jones* v. *Bales*, 58 F.R.D. 453 (N.D. Ga. 1972)). It was observed in *Roberts* v. *Barbosa*, 227 F. Supp. 20, 21 (S.D. Cal. 1964), that many inmates do not use civil suits "for the redress of genuine grievances or wrongs, but rather as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only the jailors, but Judges, Jurors, witnesses and everyone having anything to do with their conviction."

sistent with prior decisions of this Court, a judicial officer must not be held liable to civil actions for acts performed in his judicial capacity, regardless of the nature of the relief sought in those civil actions.

3.

The Role Of Judicial Immunity Today.

Judicial immunity is as important to the health of our court system today as at any time in our nation's history. As life has become more complex and impersonal, citizens have turned with greater frequency to the courts to resolve their disputes. Neither the need for the doctrine nor its underpinnings have diminished. Unless judges are to act at their peril in the exercise of their jurisdiction, the doctrine must not be eroded.

Chief Justice Warren's compelling logic in his admonition in *Pierson* v. *Ray*, 386 U.S. at 554, is as meaningful now as when he wrote it fifteen years ago:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

The Chief Justice's plea for safeguarding an atmosphere conducive to principled, fearless decision-making echoes the comments of the great jurist Learned Hand. Judge Hand observed in his landmark opinion in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), that subjecting

judges to the burden of defending themselves in a trial and to the inevitable danger of its outcome "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[11] Thus, by contributing to principled and fearless decision-making, judicial immunity continues to exist for the "sake of the public, and not merely for the protection of the judge." *Randall* v. *Brigham*, 74 U.S. (7 Wall.) at 536.[12]

In *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 735 n.13 (1980), the Court predicted that the question of awarding attorney's fees against judges would not often arise. Recent events have demonstrated that, unfortunately, the prediction may have been erroneous. A recent survey undertaken by the National Center for State Courts' Research and Information Service shows that, in 1981 alone, more than 600 actions were initiated against judges or court personnel in the forty-six states and territories participating in the survey. Ito, *A National Survey Shows Wide Variations in Actions Against Court Personnel*, 6 St. Ct. J. No. 3 Summer, 1982 at 9, 14. The disposition of most of these cases is as yet unknown. But the numbers alone attest to the potential magnitude of the problem if this Court were to sanction even limited actions against the judiciary with the possibility of attorney's fees awards in the offing.

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[11] *Gregoire* v. *Biddle*, which this Court recently cited with approval in *Briscoe* v. *Lahue*, 51 U.S.L.W. 4247 (U.S. Mar. 7, 1983), also concerned a situation in which a judge, allegedly, wrongfully imprisoned the plaintiff.

[12] As Justice Douglas commented in his dissent in *Pierson* v. *Ray*, 386 U.S. at 564 n.4, there are many other justifications for the doctrine of absolute immunity including relieving judges of the time and expense of defending suits; protecting judges from liability for honest mistakes; removing an impediment to responsible men entering the judiciary; enhancing finality of judgments; and guaranteeing the separation of powers.

In recent decades, legislatures have adopted procedures to discipline judges. Thus, continuation of absolute judicial immunity will not leave citizens without redress. Nor will it insulate the judiciary from public accountability and appropriate sanctions. In addition to appellate and habeas corpus review, all fifty states, the District of Columbia and the federal government have procedures for receiving, investigating and adjudicating complaints against judges.[13] Moreover, in Virginia, a magistrate such as Petitioner Pulliam is subject to discipline by the chief circuit court judge who appoints her. *See* Va. Code § 19.2-38 (Cum. Supp. 1982).

Finally, if the holding of the lower court repealing judicial immunity is allowed to stand, federal judges, although not subject to suit under 42 U.S.C. § 1983, may be subject to suit and attorney's fees under other provisions of the United States Code. This Court held that private causes of action may arise directly under the Constitution without the need for statutory authorization. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228, 234 (1979). In 1981, Congress amended 28 U.S.C. § 2412 to allow recovery of attorney's fees in a civil action against an official of the United States "under the terms of any statute which specifically provides for such an award."

The holding of this Court in *Butz* v. *Economou*, 438 U.S. 478, 512 (1978), compels the conclusion that if state court jurists are not immune from § 1988 attorney's

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[13] *See* American Judicature Society, *Judicial Conduct Organizations: Governing Provisions* (K. Sampson ed. 1982). The provisions regarding the federal judiciary are found in 28 U.S.C. § 372 (1980). Procedures in Virginia are codified in Va. Code §§ 2.1-37.1 through 2.1-37.18.

fee awards, neither would federal court jurists be immune from such awards under 28 U.S.C. § 2412.

> [T]here is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983.

Butz at 500.

Thus, it is important to heed Justice Field's admonition in *Randall* v. *Brigham*, 74 U.S. (7 Wall.) at 536, and not "once break down the barrier."

B.

JUDICIAL IMMUNITY IS COEXTENSIVE WITH LEGISLATIVE IMMUNITY WHICH THIS COURT HAS HELD TO BAR SUITS FOR EQUITABLE RELIEF AND ATTORNEY'S FEES.

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), this Court held that state legislators were absolutely immune from an action for damages when the gravamen of the complaint arose from their legislative duties. Writing for the Court, Justice Frankfurter traced the doctrine of legislative immunity to the English common law. The Court noted that this doctrine existed for the benefit of the public by enabling their representatives to execute the functions of their offices without fear of prosecutions, civil or criminal.

When this Court had an opportunity to consider the extent of the scope of legislative immunity in *Supreme Court of Virginia* v. *Consumers Union*, it observed that:

> we did not distinguish [in *Tenney*] between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages creates a distraction and forces [legislators] to divert their time,

> energy, and attention from their legislative tasks to defend the litigation."

446 U.S. at 733 (quoting *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)). This Court then agreed in *Consumers Union* that legislators have absolute immunity from suits seeking equitable relief. 446 U.S. at 733-734.

Given the comparable nature of the twin doctrines of legislative and judicial immunity, their public purpose, and the fact that both are so deeply rooted in the tradition of the common law, the holding of the court in *Francis* v. *Crafts*, 203 F.2d 809, 812 (1st Cir.), *cert. denied*, 346 U.S. 835 (1953), is compelling: "Certainly it would be absurd to hold, in the application of the Civil Rights Act, that judicial officers stand in any less favorable position than do state legislators. . . ." Similarly, the concept of absolute legislative immunity from suit for injunctive relief must extend to judicial immunity. The burden upon the judge of defending against such suits is no less. Nor is the inhibiting effect of being exposed to such a burden any less. Thus, to protect the citizens, who require principled decision-making in their judges just as in their legislators, this Court should hold that the doctrine of judicial immunity is co-extensive with that of legislative immunity. Any other conclusion will not serve the public interest.

C.

AN AWARD OF ATTORNEY'S FEES IS THE FUNCTIONAL EQUIVALENT OF AN AWARD OF MONETARY DAMAGES WHICH IS INDISPUTABLY PROHIBITED BY JUDICIAL IMMUNITY.

It is beyond dispute that judicial immunity bars damage liability. *Stump* v. *Sparkman*, 435 U.S. 349 (1978). Although that immunity should likewise be found to bar

prospective equitable relief, at a minimum, it must preclude assessment of attorney's fees against members of the judiciary. Thus, even if this Court decides to permit limited actions against judges, it should still hold that judges are immune from an award of attorney's fees.

No one can dispute that judges, knowing they could be subject to payment of damage awards, would probably be constrained in the actions they take. The chilling effect on the judiciary is no less chilling when the monetary award is called attorney's fees. The personal consequences of damage awards and awards of attorney's fees are no different. If anything, the consequences of an award of attorney's fees may be greater. The complex and massive § 1983 litigation conducted in our courts today often and easily results in attorney's fees awards of substantial proportions. The threat of such an award against a member of the judiciary has the same impact as a damage award and may occur more often. The label attached to the payment of the money is inconsequential.[14] *See Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974).

This reasoning was articulated and followed in *Smith* v. *Smith*, 396 F. Supp. 367 (D. Or. 1973), *aff'd mem.*, 519 F.2d 1376 (9th Cir. 1975). In that case, the court, on the basis of judicial immunity, denied a request for an attorney's fees award against a defendant state judge in a § 1983 pro-

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[14] This Court has acknowledged that attorney's fees in some instances have been awarded where "[c]ompensation was not the sole motive," and the award has "served the same purpose as a remedial fine imposed for civil contempt" and has "vindicated the District Court's authority over a recalcitrant litigant." *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978). Therefore, because the attorney's fee may embody elements other than mere compensation, it must be equated in its effect with the more common damage award which is barred by immunity.

ceeding for declaratory and injunctive relief. The Court said:

> [T]he same policies which underlie judicial immunity to damage actions prohibit the award of attorney fees in this case.
>
> In *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), relied upon in *Pierson*, *supra*, Mr. Justice Field wrote, "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of *personal consequences* to himself." (Emphasis supplied.) 80 U.S. 347. These policies are so strong that immunity applies even when the judge is accused of acting maliciously and corruptly. *Pierson, supra,* 386 U.S. at 554, 87 S.Ct. 1213. Given the basis for the doctrine of judicial immunity, no valid distinction can be drawn between an award of money *as damages* and an award of money as *attorney fees*. In either case, the *personal consequences* to the judicial officer are identical. The imposition of "such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson, supra* at 554, 87 S.Ct. at 1218.

Id. at 369-370 (emphasis in original). This unassailable logic alone mandates reversal of the judgment below.

One potentially disastrous consequence of allowing attorney's fees is that concern for professional prestige and personal pride may engender in judges the type of "defensive practice" now prevalent in the medical field. *See generally,* Check, *Malpractice Threat: More Tests Not Always the Answer,* 244 J.A.M.A. 1886 (1980). This might include in the judiciary the creation of an unnecessarily meticulous

record for review, excessively exhaustive research on every legal issue, and circumscribed decision-making—all of which could only further delay an already overburdened judicial process.[15]

II.

Congress Did Not Intend Enactment Of The Civil Rights Attorney's Fees Awards Act Of 1976 To Authorize An Award Of Attorney's Fees Against A Member Of The Judiciary For Acts Undertaken In His Judicial Capacity.

As has been demonstrated, absolute judicial immunity at common law precludes a suit against a judge, and, of course, likewise bars an award of attorney's fees against a judge. Thus, for respondents to prevail, they must demonstrate that Congress, when it passed The Civil Rights Attorney's Fees Awards Act of 1976, repealed judicial immunity.

This Court has previously observed that before it will impute to Congress the intent to abrogate a well-settled rule of common law, it must find a "clear indication" that

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[15] This scenario was perceived by this Court in 1872 in *Bradley* v. *Fisher*. Justice Field, writing the majority opinion, pointed out that

> [i]f . . . a judge could be compelled to answer in a civil action for his judicial acts . . . he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

80 U.S. (13 Wall.) at 349.

Congress "specifically . . . provided [for abrogation]." *See Pierson* v. *Ray*, 386 U.S. at 554-555. This Court has also had occasion to consider congressional action on matters affecting federalism where maintenance of the delicate balance of federal-state power is important. As the Court noted in *United States* v. *Enmons*, 410 U.S. 396, 411 (1973), " '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance,' " (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (footnotes omitted)). Surely, Congress would not lightly or ambiguously repeal a common law doctrine so fundamental and so deeply rooted in our scheme of government and jurisprudence as judicial immunity.

This Court has had many occasions to articulate the factors which should be reviewed to ascertain legislative purpose and intent. Such an analysis may begin by considering evidence of the historical context of the legislative act, *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), and the sequence of events leading up to passage. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Contemporaneous statements of the legislative sponsor are important. *See Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In addition, statements made in debate, not only by a sponsor of the legislation but also by other members of Congress, may be regarded as authoritative indicators of congressional intent. *See First National Bank* v. *Walker Bank and Trust Co.*, 385 U.S. 252 (1966). The following examination of the foregoing factors will conclusively demonstrate that Congress did not intend its passage of the Attorney's Fees Awards Act to repeal judicial immunity or to authorize the imposition of fees against judicial officers. Certainly, no member of Congress who addressed the Act when it was

before them in 1976 believed that Congress had undertaken such a significant and far-reaching action.

Analysis of the legislative history of the Attorney's Fees Award Act must begin with the premise that Congress knew it had to reveal clearly its intent to repeal a common law doctrine if such was its intent.[16] However, no such intent of Congress was evident in 1976. The purpose of the Act was simply "to remedy anomalous gaps in our civil rights laws created by" *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which this Court had decided during the preceding year. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908.

Similar bills amending 42 U.S.C. § 1988 and providing for an award of attorney's fees were introduced in the Senate and House. The Senate debated and passed its bill (S. 2278, 94th Cong. 2d Sess. (1976)). The House then debated and passed the Senate bill without considering its own bill. Thus, the Senate Report should be accorded more weight than the House Report because the Senate Report was available to both bodies as they considered the Senate bill. Conversely, the House Report was not before the Senate because the House bill was never before the Senate. Additionally, there is no indication in the record that House members received the House Report or relied upon it. Therefore, the House Report cannot realistically be said to reflect the intent of the Senate or even the entire House. *See Vaughn* v. *Rosen*, 523 F.2d 1136, 1142-1143 (D.C. Cir. 1975); *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787, 797 (6th Cir. 1972).

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[16] As noted above, *Pierson* v. *Ray* requires an express showing of legislative intent to accomplish such an undertaking.

Senator Tunney, chief patron of the bill, addressed the bill on September 29, 1976. He related examples of the types of cases in which attorney's fees would be allowed. He never indicated that fees could be awarded under the bill in cases traditionally barred by common law immunities.[17] *Id.* at 33313. Senator Kennedy followed with similar remarks, and he said nothing about these immunity doctrines. *Id.* at 33314.

Alyeska had held that under the "American Rule" the prevailing party generally may not recover attorney's fees from the loser. As the legislative response to *Alyeska*, the Act, as described in the Senate Report, was "limited to . . . a category of cases in which attorney's fees have been traditionally regarded as appropriate." S. Rep. No. 94-1011, *supra*, at 4; 1976 U.S. Code Cong. & Ad. News, *supra*, at 5912. One will search the case law in vain seeking a category of cases traditionally regarded as appropriate in which federal judges have awarded attorney's fees against state judges over a judicial immunity objection. Certainly, there is not a scintilla of evidence in the Senate Report that the legislation was intended to abrogate the well-established and deeply rooted doctrine of absolute judicial immunity.

To those who would suggest that the passage of the Act signaled creation of a new right to obtain attorney fees against judges, the Senate Report conclusively admonishes:

> This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are *to continue the practice of awarding attorneys' fees which*

[17] Subsequently, in the House debates on the bill passed by the Senate, Representatives Drinan and Railsback gave examples of the types of cases covered by the bill. They made no mention of suits against judges or of the doctrine of judicial immunity. 122 Cong. Rec. 35122 and 35124.

> *had been going on for years prior to the Court's [Alyeska] decision.*

S. Rep. No. 94-1011 at 6; 1976 U.S. Code Cong. & Ad. News at 5913 (emphasis added).

The Senate debates on the bill, which occurred between September 21 and September 29, 1976, illuminate the legislative purpose so precisely noted in the Senate Report.[18] Senator Edward Kennedy, the floor leader of the bill, represented that:

> The bill now before us, Mr. President, does not create any new legal remedies, *nor does it expand our civil right laws into new areas which Congress has not previously considered.* It merely lends substance to the private enforcement of rights already authorized under existing civil rights. Furthermore, the bill will not create any new burdens for the courts. Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the *Alyeska* decision.

122 Cong. Rec. 31472 (1976) (emphasis added). Subsequently, on September 22, Senator Hathaway echoed the Senate Report, saying that the bill "contains no startling new remedy" and that it was needed so that the courts could "continue the practice of awarding attorney's fees which had been going on for years prior to the *Alyeska* decision." *Id.* at 31832.

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[18] There was no discussion or even mention of judicial immunity or other common law immunities during the debates. 122 Cong. Rec. 31271, 31470-31483, 31487-31490, 31829-31835, 31846-31858, 31868, 32171-32172, 32175-32176, 32183-32185, 32296-32298, 32383-32384, 32387-32398, 32405, 32926-32927, 32929-32934, 33310-33315 (1976).

Even the Senators opposing the bill agreed that it did not expand civil rights. For example, Senator Allen led the Senate opposition to the bill because he saw it as a windfall for lawyers. He observed that it provided for "not one single additional substantive civil right or the enforcement of one single civil right." 122 Cong. Rec. 31473. Reiterating his conclusions later in similar terms, he said the bill "is definitely not a civil rights bill because it protects no civil rights and adds no civil rights." *Id.* at 32396.

After the Senate had passed its bill, the measure was considered and debated in the House. Again, there was no mention in the debates of common-law immunities, much less of an intent to abrogate any such immunity. To the contrary, Representative Anderson of Illinois said, "[B]efore someone makes the charge that this bill is establishing some kind of precedent or opening some . . . new Pandora's Box, I think we should set the record straight at the outset." *Id.* at 35114. He then expressed the need for the legislation to fill the void left by the *Alyeska* decision, and he remarked that there existed "no logical reason to deny this authority to the courts. . . ." *Id.*

Representative Drinan, who was the patron of the House bill and acted as floor manager of the Senate bill in the House, stated, "[T]here is no change in the substantive preexisting law in this case before this body at this time. . . . We accept preexisting law, whatever it is. . . ." *Id.* Representative Railsback then remarked, "[I]t is clearly not the intent of Congress to create a new remedy," and Mr. Drinan responded, "I concur completely. . . ." *Id.* at 35116-35117. Mr. Railsback added, "[W]hat we are really doing is codifying the practice that was going on prior to the *Alyeska* case." *Id.* at 35117. Representative Anderson replied, "That is my understanding." *Id.*

Representative White asked, "Does this act we are attempting to pass now supersede the court decisions?" Representative Drinan answered in part, "[I]t is all carefully regulated by a body of law which goes back at least 50 years, and this would not be necessary . . . at all had it not been for a technical decision [in *Alyeska*]. . . ." *Id.* at 35118. Representative Drinan later remarked, "[T]he *Alyeska* decision ended that practice, which this bill seeks to restore."[19] *Id.* at 35122. Representative Fish echoed this point and said, "[T]his bill restores to the courts authority which they had exercised for years under the private attorneys general concept." *Id.* at 35126.

Significantly, Representative Kastenmeier, chairman of the House subcommittee which studied the House and Senate bills, supported the bill and said:

> [T]his is a *first step* and a *rather limited and cautious one. It does not overturn law or practice, except the Alyeska case.* . . . The Subcommittee on Courts, Civil Liberties and the Administration of Justice intends to continue the active study of the bills presented by these Members, and to consider drafting new legislation. An omnibus approach, though not recommended by the Justice Department, may be an appropriate vehicle for such legislation. However, the issue needs much further analysis than this session would allow.

Id. at 35126 (emphasis added).

In the case at bar, the Court of Appeals below ignored this wealth of evidence which conclusively demonstrates

[19] In regard to causes of action under the Civil Rights Acts, Mr. Drinan pointed out, "[W]hatever is presently allowed or forbidden under them would continue to be permitted or forbidden." 122 Cong. Rec. 35122. Along the same lines, Mr. Railsback said, "[T]his bill does not authorize or statutorily grant any private right of action which does not now exist." *Id.* at 35124.

that Congress intended neither to abrogate the doctrine of judicial immunity nor create a startling new remedy; rather, Congress merely permitted continuation of a tradition of awarding attorney's fees begun well before 1975 when this Court decided *Alyeska*. Almost inexplicably, the lower court misconstrued the will of Congress and significantly changed the balance of federalism by imbuing federal judges with authority to impose attorney's fees awards against state court judges when they did not previously possess such authority.[20]

The Court below rested its decision upon the wafer thin reed of two sentences and one oblique footnote in the House Report.[21] The two sentences quoted by the Court from the House Report[22] were as follows:

> Furthermore, while damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and

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[20] Compare *City of Greenwood* v. *Peacock*, 384 U.S. 808, 834 (1966), in which the Court, in discussing federalism and the interpretation to be accorded the removal provisions of 28 U.S.C. § 1443(2), postulated "grave questions of practice and policy" to point out that "if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them."

[21] Similarly, the Third Circuit Court of Appeals in *Morrison* v. *Ayoob*, 627 F.2d 669 (3d Cir. 1980), assumed, without deciding, that injunctive and declaratory relief was not barred by judicial immunity, and, essentially on that basis and the isolated language in the House Report awarded attorney's fees against a judicial officer.

[22] As previously noted on page 23, the House Report was never before the Senate.

> necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976). Footnote 17 contained in the quote makes a reference to several decisions of this Court including *Pierson* v. *Ray*.[23]

Such a general and cursory reference to "immunity doctrines" patently fails to abrogate judicial immunity. A reasonable reading of the language indicates that the House Report was referring to qualified immunities of officials in the executive branch of government. Likewise, the bald citation of *Pierson* in footnote 17 of the House Report, among a listing of cases discussing qualified immunities, is not persuasive to demonstrate repeal of judicial immunity. In addition to discussing judicial immunity, *Pierson* also extensively discussed qualified immunity for police officers under § 1983. Thus, when read in context, there is no reason to construe that footnote as anything more than a general reference to types of cases answerable to suit and trial under qualified or "good faith" immunity. *See Pierson*, 386 U.S. at 551-552, 555-558.

In *Alyeska*, this Court held that it was "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." 421 U.S. at 247. Similarly, it was inappropriate for the Court of Appeals below, without legislative guidance, to shift the burden onto a defendant who, for the public's protection, is insulated by the doctrine of judicial immunity. Simply stated, the Court of Appeals erred when it forced the Attorney's Fees Awards Act to carry baggage it was not designed to carry. That error requires reversal of the Court's judgment entered below.

[23] This Court in *Consumers Union*, 446 U.S. at 738, took note of this portion of the House Report but held that there was no indication in the legislative history that Congress intended the Attorney's Fees Act to operate where absolute immunity is applicable.

III.

The Eleventh Amendment To The Constitution Is A Jurisdictional Bar To An Award Of Attorney's Fees Against A Judge Sued In His Official Capacity.

A grant of attorney's fees in a suit which seeks equitable relief against a judge acting in his official capacity constitutes the type of award which may be granted only after an express waiver of the Eleventh Amendment immunities by Congress. *See Quern* v. *Jordan*, 440 U.S. 332 (1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). As this Court noted in *Edelman*, the Eleventh Amendment bar is jurisdictional in nature and can be raised at any time. 415 U.S. at 678.[24]

As previously noted, civil rights actions are often complex, and attorney's fees awards arising out of such actions are frequently substantial. If this Court limits the scope of judicial immunity and permits an attorney's fee award to be rendered against a judge sued only in his official capacity, it is possible that such an award would be payable only from the public treasury. In such a situation, the award would not have a mere "ancillary effect on the state treasury." *Id.* at 668. Nor can such an award be characterized as "the necessary result of *compliance* with decrees which by their terms [are] *prospective* in nature." *Id.* (emphasis added). The award of attorney's fees in such an instance is retroactive in nature because it must be predicated upon a finding of past violations. Therefore, it is barred by the Eleventh

[24] In *Patsy* v. *Board of Regents*, —— U.S. ——, 102 S. Ct. 2557, 2568 n.19 (1982), this Court stated, "We have noted that the 'Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court' " (quoting *Edelman* v. *Jordan*, 425 U.S. 651, 678 (1974)).

Amendment. *See Hutto* v. *Finney*, 437 U.S. 678, 708 (1978) (Powell, J., dissenting in part).[25]

CONCLUSION

This Court has noted that "[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States and there is no reason to think that . . . all are not doing their mortal best to discharge their oath of office." *Sumner* v. *Mata*, 449 U.S. 539, 549 (1981). Nevertheless, there is often disagreement among judges on the proper resolution of an issue. This disagreement undoubtedly arises out of the atmosphere carefully created over the centuries to encourage principled and fearless decision-making.

Judicial immunity is essential to the proper administration of justice. The public interest will be protected only by its maintenance. Judicial immunity, like legislative immunity, is absolute. It bars all civil actions against members of the judiciary for acts undertaken in their judicial capacity. It defeats the very basis upon which an award of attorney's fees must be founded.

In adopting The Attorney's Fees Awards Act of 1976, Congress did not intend to repeal judicial immunity. Senator Kennedy and Representatives Drinan, Railsback and Kastenmeier, as leaders of Congress on this issue, intended only to permit a practice which had traditionally been followed by lower federal courts for fifty years prior to *Alyeska*. That fifty-year tradition never included awarding attorney's fees against judges over an objection of judicial immunity.

[25] The majority opinion in *Hutto*, awarding attorney's fees against the State of Arkansas, is distinguishable because the Arkansas Department of Corrections, as an agency of the State, had failed to comply with *preexisting* federal court orders.

Accordingly, the judgment of the Court of Appeals below was erroneous and must be reversed.

Respectfully submitted,

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

Does judicial immunity bar an award of attorneys' fees pursuant to 42 U.S.C. § 1988 against a member of the judiciary acting in his judicial capacity?

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BRIEF FOR RESPONDENTS

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, concerning attorneys' fees and from which the Petitioner appealed, is not reported and is included in the Joint Appendix at pages 38-42. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued September 22, 1982, is reported as *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982), and a copy appears at pages 43-50 of the Joint Appendix. The Order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on November 29, 1982, and a copy is contained in the Joint Appendix at page 51.

JURISDICTION

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 42 U.S.C. § 1983 [hereinafter also § 1983] provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. § 1988 [hereinafter also § 1988] provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On January 10, 1980, Respondent Richmond R. Allen was arrested in the County of Culpeper, Virginia, and charged with violation of § 18.2-416 of the Code of Virginia, breach of the peace by cursing and abusing. Section 18.2-416 is a class 3 misdemeanor for which the maximum penalty is a fine of $500.00. The magistrate, Petitioner Gladys Pulliam, set a bond of $250.00. Allen was unable to pay the bond, and Petitioner then committed Allen to the Culpeper County jail where he remained incarcerated for fourteen days. While in jail, he had no appointment of counsel, no advice of rights, and no first appearance before a judge as provided by § 19.2-158 of the Code of Virginia[1] even though the appropriate judge, Judge Basil Burke, sat in Culpeper on January 17, 1980. Respondent Allen remained in jail until January 24, 1980, at which time he was tried by Judge Burke. Despite the complete absence of any evidence whatsoever against Respondent, he was found guilty and sentenced to five days in jail, with credit for time already served. Respondent Allen subsequently had the conviction reopened and was found not guilty. (App-25).

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[1] Section 19.2-158 of the Code of Virginia requires an accused who is incarcerated awaiting trial for an incarcerable offense to be brought before the trial judge on the first date on which the judge is sitting after the accused is incarcerated. VA CODE ANN. § 19.2-158 (1983 Repl. Vol.).

On January 16, 1981, Respondent Allen filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division. He sought declaratory and injunctive relief against Petitioner Pulliam's practice of incarcerating persons awaiting trial for non-incarcerable offenses and against Judge Burke's failure to provide a first appearance, appointment of counsel, and advice of rights.

On May 8, 1981, Jesse W. Nicholson, who had been incarcerated repeatedly pursuant to the challenged practice, intervened as a party plaintiff. Within the two-month period immediately before and after the filing of the suit on January 16, 1981, Respondent Nicholson had been arrested four times in the County of Culpeper for alleged violations of § 18.2-388 of the Code of Virginia, being drunk in public. Section 18.2-388 is a class 4 misdemeanor for which the maximum penalty is a $100.00 fine. In connection with each of these arrests Respondent Nicholson was jailed for inability to post bond. The periods of incarceration varied from two to six days. They included incarceration for six days beginning January 16, 1981, the date this suit was filed, and for two days on February 24, 1981, over a month after this suit was filed. (App-25).

The District Court found it to be Petitioner's practice to require bond for non-incarcerable offenses. (App-25). Within the five-month period surrounding the filing of this suit, at least thirty-four people who were unable to pay bond were held in jail upon arrest for non-incarcerable offenses. (App-26).

The Office of the Attorney General for the Commonwealth of Virginia has represented Petitioner from the beginning of this suit. (App-16). Throughout the case, Petitioner "vigorously contested" (App-41) that any of

the alleged acts were unconstitutional, relying on authority which the District Court characterized as "quite frankly anemic" (App-26).

The District Court, finding that there were no material facts in dispute, entered summary judgment on June 4, 1981 (App-22), based on the Stipulations of Fact and exhibits (App-24). The Court declared that the practice of incarcerating persons awaiting trial for non-incarcerable offenses violated Respondents' rights to due process and equal protection, and enjoined continuation of the practice. Finding it unnecessary to reach the issue of the rights attendant upon such incarcerations, the Court dismissed Judge Burke from the suit. This final Order on the merits of June 4, 1981, (App-22-23) was not appealed.

On June 15, 1981, Respondents submitted a request for attorneys' fees and costs amounting to approximately $7,500.00. Petitioner filed an Objection thereto and accompanying Memorandum in which Petitioner objected to the amount of the award as excessive but not to the award itself. (App-33-37). The District Court granted the amount requested by Order dated July 6, 1981, and, on July 27, 1981, Petitioner appealed this award.

The award was unanimously affirmed by the United States Court of Appeals for the Fourth Circuit on September 22, 1982, and Petitioner's Petition for Rehearing and for Rehearing *En Banc* was denied November 29, 1982.

After a subsequent request for a stay was also denied by the Court of Appeals, Petitioner filed an "Application for Stay" (A-645) with this Court. The Application was denied January 31, 1983, by the Chief Justice, and the amount was thereafter paid in full by the Commonwealth. This Court granted a Writ of Certiorari on April 25, 1983,

together with Respondents' request to proceed *in forma pauperis*.

SUMMARY OF ARGUMENT

This Court, in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), held that a judge who ordered a minor sterilized without her knowledge on the basis of no valid authority was absolutely immune from damages. Petitioner and her numerous judicial or judicial-insuring *amici*[2] are now asking this Court to extend judicial immunity even farther, to foreclose suits for declaratory and injunctive relief and concomitant attorneys' fee awards against a judicial officer.[3]

There is no justification for exempting judicial officers from the plain language of § 1988. The availability of

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[2] All of Petitioner's *amici* are judicial officers or government entities charged with the representation and indemnification of judicial officers. Of the brief by *amici*, Respondents refused consent only to that by the ABA. Although consent for this brief was originally requested by and given to Judge Phillip Roth on behalf of a judicial section of that organization, information received from ABA officers indicated that the approval later sought by Judge Roth for his *amicus* brief as representative of the ABA was obtained pursuant to procedures at best highly unusual for that organization, and possibly violative of ABA rules. The "policy" upon which the brief was approved was enacted together with the brief's approval by the Board of Governors on June 3, after submission of the request only days before, without opportunity for mature consideration by and input from all sections of that organization, and without even the presence before the Board of Judge Roth's final brief to approve. Accordingly, in addition to the failure of the brief to address any points not otherwise fully addressed, Respondents had reason to doubt that the brief was in fact an actual expression of ABA policy.

[3] Petitioner is a state magistrate, a position distinguished frequently from that of judge in various sections of the Code of Virginia. *See, e.g.*, VA. CODE ANN. § 19.2-271 (1983 Repl. Vol) (distinguishing a judge from a "clerk of any court, magistrate, or other

prospective relief and § 1988 awards are inextricably bound. Therefore, unless this Court were to decide that the traditional immunity of judicial officers from an award of damages should now be extended to suits for prospective relief under § 1983, § 1988 awards of attorneys' fees against judicial officers are proper.

Furthermore, this Court should not extend judicial immunity to suits for prospective relief. For the narrow range of cases in which constitutional violations by judicial officers cannot be corrected on appeal, such an extension would have a deleterious effect upon the ability of federal courts to protect federal constitutional rights, would be contrary to Congress' intent in enacting § 1983 and to this Court's past interpretation of that provision, and would not be justified by any sound analysis of the doctrine of judicial immunity.[4]

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person having the power to issue warrants . . .," in connection with competency to testify).

Petitioner performed two functions which were at issue. While the setting of bond for a non-incarcerable offense was clearly discretionary, the committal to jail upon Respondents' inability to pay was purely executive, involving the filling out of forms, and the forwarding of necessary papers to the Sheriff.

[4] Respondents relied in their Brief in Opposition to the Petition for Writ of Certiorari on the fact that the propriety of the underlying relief was not preserved as an issue. On June 4, 1981, the District Court granted declaratory and injunctive relief against the Petitioner. (App-22-23). That Order was not appealed and is final. On July 6, 1981, the District Court entered its Order awarding attorneys' fees and costs. (App-38). Petitioner appealed only this second Order, on July 27, 1981.

Thus, although the opinion of the Fourth Circuit Court of Appeals may appear to address the propriety of the prospective relief, it in fact only addresses the propriety of the attorneys' fee award when prospective relief has been allowed. Because this Court has granted the writ of certiorari, however, Respondents will proceed to address the propriety of the prospective relief which led to the § 1988 award.

ARGUMENT

I. IF PROSPECTIVE RELIEF MAY BE OBTAINED AGAINST JUDICIAL OFFICERS, ATTORNEYS' FEE AWARDS ARE PERMITTED BY SECTION 1988.

A. Section 1988 mandates in plain language the availability of attorneys' fee awards whenever relief under § 1983 is properly obtained.

Title 42 U.S.C. § 1988 provides as follows:

> In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

The statute is clear on its face. The authorization of attorneys' fees is definite, unambiguous, and unqualified. Such fees are authorized "[i]n *any* . . . proceeding to enforce a provision of . . . 1983 . . ." (emphasis added). As this Court noted in *Hutto* v. *Finney*, 437 U.S. 678 (1978), "[t]he Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. . . . The legislative history is equally plain." *Id.* at 694. Because suit for prospective relief from constitutional violations against a defendant immune from damages is such a proceeding, § 1988 applies thereto.

The legislative history reinforces the literal meaning of this plain language. As an example, the only language in the legislative history to address directly the relationship of § 1988 to existing immunities under § 1983 explains as follows:

> Furthermore, while damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, *preclude* or severely limit the damage remedy.[17] Consequently awarding counsel fees to

> prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. REP. NO. 1558, 94th Cong., 2d Sess. 9 (1976) (text of footnote omitted) (emphasis added).[5] The footnote contained therein refers specifically to three cases: *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); and *Pierson* v. *Ray*, 386 U.S. 547 (1967). Of the three cases, the only case to involve actual preclusion of a damage award is *Pierson* v. *Ray*, affirming such a preclusive immunity for judges. This Report thus confirms that Congress intended its plain language of § 1988 to apply to judicial officers. *Morrison* v. *Ayoob*, 627 F.2d 669, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). As further confirmation, the Report proceeds to state immediately thereafter its specific intent that such counsel fees be awarded where injunctive relief is consequently the only relief sought. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 9 (1976); *accord* S. REP. NO. 1011, 94th Cong., 2d Sess. 3 (1976).

Congress' explicit expression of § 1988's purpose supplies even further confirmation that Congress meant what it said in § 1988. The reports of both House and Senate make abundantly clear that, because of the frequent financial disparity between the victims of constitutional violations and the offending government

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[5] Petitioner's *amici* point out that the House bill was not ultimately adopted but rather the Senate bill. Yet because the bills were virtually identical, the expressions by House members as to their intent in passing the House bill would obviously apply with equal force to the Senate bill. *Compare* S. 2278, 94th Cong., 2d Sess. (1976), *with* H.R. 15460, 94th Cong., 2d Sess. (1976).

officials,[6] such an attorneys' fee award is necessary to give meaning and effect to § 1983. S. REP. No. 1011, 94th Cong., 2d Sess. at 2; *accord* H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976). The Senate Report, for example, notes:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP No. 1011, 94th Cong., 2d Sess. 2 (1976). Such language refers most appropriately to suits against officers immune from damage awards, since damage awards could provide a source for costs and attorneys fees.

Thus, while Congress has not abrogated judicial immunity from damages, *Pierson* v. *Ray*, 386 U.S. 547 (1967), Congress has instead enacted § 1988 to make certain at least that prospective relief, available in theory against judges, prosecutors and other defendants absolutely immune from damages, is made available in fact by an award of costs, including attorneys' fees.[7]

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[6] The reports on § 1988 also make clear that such attorneys' fee awards are not to be paid by the officials personally.

> In . . . cases [involving State or local bodies or State or local officials] it is intended that the attorneys' fees, like other items of costs, will be collected directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. REP. No. 1011, 94th Cong., 2d Sess. 5 (1976) (footnotes omitted).

[7] This Court has also acknowledged, as in *Pierson* v. *Ray*, 386 U.S. 547 (1967), Congress' ability to affect judicial officers by its civil

Recognizing that an award of attorneys' fees under § 1988 is inextricably intertwined with the availability of relief under the civil rights acts, if only prospective relief, this Court, in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), stated to the point:

> The House Committee Report on the Act indicates that Congress intended to permit attorneys' fee awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards.

Id. at 738-30, *citing* H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976). Thus, this Court reasoned that if the defendants in *Consumers Union* had acted in a legislative capacity, they were immune from an award of attorneys' fees under § 1988 because they were absolutely immune from any suit on the merits under § 1983. *Consumers Union*, 446 U.S. at 732; *cf. Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975) (holding same for Congress). Neither § 1983 nor § 1988 could have any application to such officials. On the other hand, if the defendants had acted as prosecutors, against whom prospective relief would be clearly permissible, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), then § 1988 fees would follow the properly obtained relief *even though prosecutors are immune from damages awards. Consumers Union*, 446 U.S. at 736-37.

Therefore, as *Consumers Union* acknowledged, the only relevant inquiry as to the ability to obtain an attorneys' fee award under § 1988 against a judicial officer is whether or not he is immune from § 1983 relief. If relief

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rights legislation. *Cf., e.g., Maher* v. *Gagne*, 448 U.S. 122 (1980) (recognizing Congress' broad powers under § 5 of the Fourteenth Amendment).

under § 1983 is proper, Congress has mandated application of § 1988.

B. Congress has allowed no exemption from § 1988 for judicial officers or any other class of potential defendants under § 1983.

Not only is § 1988 clear on its face, but Congress has affirmatively demonstrated its intention to allow no exemption from its coverage. Although amendments were proposed to allow exemptions for certain officials from § 1988, these amendments were explicitly rejected. *Hutto* v. *Finney*, 437 U.S. 678, 694 (1978); *see* 122 CONG. REC. 31,832-34 (1976) (amendment of Sen. Helms); 122 CONG. REC. 32,298 & 32,388-89 (1976) (amendment of Sen. Allen). The rejection of the proposed exemptions is consistent with the legislative purpose to "close a loophole in our present civil rights enforcement laws," 122 CONG. REC. 32,185 (1976) (remarks of Sen. Tunney), not to create one, and to provide for vindication of constitutional rights particularly in those areas where vindication would be otherwise financially unavailable, as where damage suits are precluded. *See* S.REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976); H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

Yet Petitioner and her *amici* argue that this Court should read into § 1988's language an exemption for judicial officers which is not there. They speak of the absence of clear abrogation of judicial immunity by § 1988.[8] This argument rests upon a fundamental misperception of the backdrop against which Congress enacted § 1988.

When Congress enacted § 1988, there was no judicial immunity from prospective relief. Whereas immunity of

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[8] *See, e.g.*, Brief on Behalf of Petitioner at 29; Brief of ABA at 7.

judicial officers from damage actions had been well established, *see Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), this Court had "never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts." *Consumers Union*, 446 U.S. at 735. It had never rendered one opinion extending judicial immunity to prospective relief.[9] On the contrary, in a number of decisions in the years immediately preceding enactment of § 1988, the Court had at least implied that judicial immunity did not bar such relief.

In *Boyle* v. *Landry*, 401 U.S. 77 (1971), for example, a case decided the same day as *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Samuels* v. *MacKell*, 401 U.S. 66 (1971), this Court was presented with a request for declaratory and injunctive relief against a number of defendants, including "the Chief Judge, and two Magistrates of the Circuit Court," 401 U.S. at 78, whom plaintiffs sought to enjoin from enforcement of certain statutes. Relief was

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[9] Although this Court has spoken of absolute immunity of judges from civil liability, this language has been used only in the context of damages claims against judges. Similar language has been used in connection with prosecutorial immunity. *See Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *cf. Harlow* v. *Fitzgerald*, 102 S. Ct. 2727, 2733 (1982) ("Our decisions have also extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials . . ., and the President of the United States . . ."). Hence, the term "absolute immunity" has been used in two different contexts: most frequently to designate the degree of immunity from damages liability, *see, e.g., Imbler* v. *Pachtman*, to be contrasted with qualified immunity, *see, e.g., Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); but also to mean the genuinely absolute immunity from any suit or action of any sort, which this Court has reserved for legislators acting in their legislative capacity, *see Consumers Union*, 446 U.S. 719. (1980).

denied on grounds of equity and comity. *See Younger* v. *Harris*. Yet nowhere in the opinion is there any suggestion that "the Chief Judge, and two Magistrates" were not permissible parties defendant. Indeed, they were most appropriate since plaintiffs were seeking to enjoin state court proceedings to which defendants responded by reliance on 28 U.S.C. § 2283.[10]

The decision in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971), was rendered the same day as *Boyle*. In *Wadmond*, the Court was once again presented with an action for declaratory and injunctive relief against judicial officers. The lower court, 299 F. Supp. 117 (S.D.N.Y. 1969), had refused to extend judicial immunity to prospective relief, stating:

> The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have; rather, it would furnish a definitive ruling on a point of federal law for their future guidance. . . .

Id. at 123 (Friendly, J.). Affirming the decision below, this Court once again gave no suggestion that the judicial officers were improper defendants.

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[10] 28 U.S.C. § 2283, also known as the anti-injunction statute, provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.

As is plain from its terms, the act was aimed at the practice of suing state court judges, although this Court was quick to hold that the statute could not be circumvented by the tactic of naming a party to a proceeding rather than the judge himself. *See, e.g., Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940) (holding same for § 2283's predecessor). The very existence of this statute is itself persuasive evidence of the otherwise unfettered ability to seek prospective relief against state judges in federal courts.

Immediately after *Boyle* and *Wadmond*, this Court squarely addressed the merits of another case presenting prospective relief against a judge. In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the Court reversed the lower court's dismissal of a class action seeking a declaration that court fee statutes were unconstitutional. Justice Harlan, writing for the majority, found that such measures denied due process to indigents, and not a single member of the Court, including Justice Black in dissent, expressed any concern over judicial immunity. Moreover, as with the case of *Wadmond*, it is unlikely that the Court in *Boddie* simply failed to notice the immunity issue. The lower court, although dismissing the suit for failure to state a claim, had explicitly considered and rejected the claim of judicial immunity. *See Boddie* v. *Connecticut*, 286 F. Supp. 968, 971 (D.Conn. 1968).

Soon after *Boddie*, this Court decided *Mitchum* v. *Foster*, 407 U.S. 225 (1972), in which it held § 1983 to be an exception to 28 U.S.C. § 2283. The *Mitchum* Court observed that state judges were often implicated in the lawlessness which prompted the civil rights acts and that § 1983 was intended "to enforce the provisions of the Fourteenth Amendment against state action, . . . whether that action be executive, legislative, or *judicial*." *Id.* at 240 (quotation and citation omitted) (emphasis in *Mitchum*). The Court further stated:

> [T]his Court long ago recognized that federal injunctive relief against a state court proceeding can in some instances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.

Id. at 242. And once again, while the members of the Court addressed the concerns of *Younger* v. *Harris*, they expressed no concern about judicial immunity.

On yet another occasion prior to the passage of § 1988 the Court considered a suit for prospective relief against a judicial officer. In *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), relief was denied, but not on judicial immunity grounds. Rather, the Court found the contentions of constitutional violations wholly speculative in that none of the respondents had alleged any actual or threatened injury. Should such conjectural violations have subsequently occurred, they could have been "review[ed] on direct appeal or postconviction collateral review. . . . In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available." *Id.* at 502. On this basis alone, the Court reversed *Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir. 1972), in which decision, as the lower courts in *Boddie* and *Wadmond*, the Court had rejected a claim of judicial immunity. *See also Leeke* v. *Timmerman*, 454 U.S. 83 (1981), *rev'g on other grounds Timmerman* v. *Brown*, 528 F.2d 811 (4th Cir. 1975) (cited by this Court in *Consumers Union*, 446 U.S. at 735 n. 13, as representative of the Fourth Circuit's position, together with that of other circuits, that judicial officers are not immune from prospective relief); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975) (involving an action for prospective relief which included judicial officers at the lower court stage); *Allee* v. *Medrano*, 416 U.S. 802 (1974) (involving an action for prospective relief which included judicial officers at the lower court stage).

While these decisions have implicitly acknowledged the ability to sue judicial officers for prospective relief, *Heimbach* v. *Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979) (citing *Boddie* v. *Connecticut*, 286 F. Supp. 968 (D.Conn. 1968), as "*rev'd on other grounds but aff'd sub silentio on limitation on judicial immunity*, 401 U.S. 371 (1970)"), the large majority of lower federal courts have explicitly

recognized this limitation of judicial immunity.[11] Courts have also awarded court costs and attorneys' fees against judicial officers. *See, e.g., United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967) (ordering an award of attorneys fees and costs in a civil rights complaint brought by the United States).

In light of such background, Congress obviously contemplated the continuation of suits for prospective relief against judicial officers. Consequently, whether or not Congress explicitly *confirmed* § 1988's application to judicial officers, prosecutors, or other classes of defendants, it most clearly did not *exempt* judicial officers from its mandate. Congress intended that § 1988 apply to suits for prospective relief against judges and prosecutors and any other defendants immune from damages, and that, when prospective relief be obtained, attorneys' fee awards be allowed. H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976).

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[11] At least eight circuits has explicitly so stated. *See, e.g., Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 26 (1st Cir. 1982); *Morrison* v. *Ayoob*, 627 F.2d 699, 672-73 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Harris* v. *Harvey*, 605 F.2d 330, 335 n. 7 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); *Slavin* v. *Curry*, 574 F.2d 1256, 1264 (5th Cir. 1978), *vacated as moot*, 583 F.2d 779 (5th Cir. 1978); *Kelsey* v. *Fitzgerald*, 574 F.2d 443 (8th Cir. 1978); *Shipp* v. *Todd*, 568 F.2d 133 (9th Cir. 1978); *Person* v. *Association of Bar of City of New York*, 554 F.2d 534, 537 (2d Cir. 1977), *cert. denied*, 434 U.S. 924 (1977); *Fowler* v. *Alexander*, 478 F.2d 694, 696 (4th Cir. 1973). Three more circuits appear to agree. *See, e.g., WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981); *Henrikson* v. *Bentley*, 644 F.2d 852, 855 (10th Cir. 1981); *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C.Cir. 1977). *Segarra* v. *McDade*, ___ F.2d ___, No. 82-6170 (4th Cir. Apr. 26, 1983), which Petitioner cites as a contrary holding in the Fourth Circuit, *see* Brief on Behalf of Petitioner at 11, is actually inapposite.

Therefore, § 1988's language and its surrounding legislative and judicial history foreclose any severance of an award under § 1988 from the issue of prospective relief obtained under § 1983. The only question remaining is whether judicial immunity should be extended to prospective relief from constitutional violations under § 1983.

II. JUDICIAL IMMUNITY SHOULD NOT BE EXTENDED TO SUITS FOR PROSPECTIVE RELIEF.

A. An extension of judicial immunity to prospective relief would render a class of federal constitutional violations wholly beyond the power of federal courts to protect.

Respondents Allen and Nicholson brought suit for declaratory and injunctive relief against Petitioner's practice of requiring bond for persons charged with non-incarcerable offenses and of jailing such persons if unable to pay bond. Under this practice, at least thirty-four persons were jailed in the Culpeper County jail for non-incarcerable offenses during a five-month period surrounding the time this suit was filed. During a two-month period, Respondent Nicholson was jailed at least four times for the inability to post bond for a non-incarcerable offense. These incarcerations included one for six days on the day this suit was filed and one for two days over a month later. The longest such incarceration shown was that of Respondent Allen, who was incarcerated for fourteen days.

During such incarcerations, Respondents were appointed no counsel, advised of no rights, given no appearance before any judge until their trials. They therefore had no ability to make use of any appeal provision or other remedy that might have been available to those with counsel. Instead, Respondents were kept in jail and at the

mercy of the system until a judge summoned them to trial.[12]

The inability to correct the violations of Respondents' constitutional rights through normal channels of appellate review must be of primary importance in this Court's decision on the issue of immunity from prospective relief. From the beginning of the doctrine of judicial immunity in this country, this Court has been mindful of the existence of alternative remedies.

> Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort.

Bradley v. *Fisher*, 80 U.S. (13 Wall.) 335, 354 (1872). In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court also observed that the "errors may be corrected on appeal" and that such correction was preferable to having litigants "hound [a judge] with litigation charging malice or corruption." *Id.* at 554; *accord Butz* v. *Economou*, 438 U.S. 478, 512 (1978) (noting "the safeguards built into the judicial process" with regard to judicial immunity from damages); *cf. Nixon* v. *Fitzgerald*, 102 S.Ct. 2690, 2706 n. 38 (1982) ("The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity"). In fact, the Plaintiffs in *Pierson*, at

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[12] Though not ultimately an issue at the District Court level, the fact was stipulated that on the same day that Responent Allen, who is black, was arrested and incarcerated, another man, who is white, was arrested and incarcerated awaiting trial for the identical charge. However, the other man was brought to trial before the trial judge on January 17, a week before Respondent Allen was summoned from jail and tried.

the time they sued for damages, had already achieved appellate correction of the unconstitutional convictions.[13]

However, in the present case normal channels of appellate review were wholly unavailing. Thus, unlike this Court's decision in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), which merely reaffirmed judicial immunity from damages awards, an extension of judicial immunity to the present case would foreclose much more than mere compensation. An extension of judicial immunity to bar prospective relief would create in our judicial system an unprecedented gap in the justiciability of claims involving fundamental constitutional rights. Not only would there be no means by which to compensate individuals for violations of their constitutional rights, but, even more devastating, *there would be no way ever to review and correct such violations*. Not only would a judicial officer be immune from damages for violating constitutional provisions; but additionally, and more importantly, a federal court would have absolutely no power to stop him from committing the same violation again and again.

As stated by Chief Justice Marshall:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws when he receives an injury.

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). In the United States, this concept even antedates that of judicial immunity from damages, *see Randall* v.

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[13] Respondent Allen suffered another violation of a constitutional right, by Judge Burke, who found him guilty on the basis of no evidence. However, this was able to be corrected through more routine channels. Immediately following his release, Allen sought counsel who, *pro bono publico*, was able to have the conviction timely reopened, whereupon Respondent was acquitted. Judge Burke was never, consequently, sued in connection with this violation.

Brigham, 74 U.S. (7 Wall.) 523 (1869), and is much more basic to a democratic government. This Court has recognized it as so basic that, in order to close other gaps in the justiciability of claims such as that presented by cases capable of repetition yet evading federal review, this Court has even reexamined Article III's case or controversy requirement. *See Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (enunciating the "capable of repetition yet evading review" exception); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (enunciating the changing class concept).

Petitioner and her *amici* appear to realize the importance of this consideration to this case: "An important factor in this Court's functional analysis . . . is whether there are alternative remedies available to the public to deter wrongdoing by that official or whether civil suits are the only realistic alternative." Brief for the Conference of Chief Justices (the Conference) at 12. Accordingly, they then discuss at length purported "alternatives" which could[14] have provided relief. Yet their analyses fail in this attempt for two reasons.

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[14] The Conference suggests not only what Respondents *could* have done but what they *ought* to have done, failing which they should be barred from relief, as if Respondents could be held to account for their failure to escape their own unconstitutional incarceration. This typifies the inequality and unfairness which has been but one reason many scholars of the doctrine of judicial immunity have called for a more qualified doctrine. *See, e.g., Block, Stump* v. *Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Feldthusen, *Judicial Immunity: In Search of an Appropriate Limiting Formula*, 29 U.N.B. L.J. 73 (1980); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson* v. *Ray Reconsidered*, 65 NW. U.L. REV. 615 (1970); Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390 (1977); Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978); Nahmod, *Persons*

First, their suggestions fail because, even if theoretically Respondents in the present case could somehow have prevented and terminated their unconstitutional jailings through some other channel, such would not end the inquiry. Before extending judicial immunity, this Court should consider the ramifications in cases which are not before it. Even if such actions as writs of mandamus were possible to achieve for persons such as Respondents locked in the Culpeper County jail without counsel, prospective relief must be available when a state has no writs of mandamus or when a state refuses a properly sought writ of mandamus or when, *for whatever other reason*, a state does not correct commission of a federal constitutional violation by its state or local judges or magistrates.

Second, the suggested "alternatives" by which Respondents in the present case could have, it is argued, achieved necessary relief are nothing short of make-believe. For example, it is postulated that Respondent Allen,[15]

> could have petitioned for state habeas corpus relief. In addition, in this as in other state criminal cases, Respondent, after having exhausted state court re-

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Who Are Not "Persons": Absolute Individual Immunity Under Section 1983, 28 DEPAUL L.REV. 1 (1978); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA.L.REV. 833 (1978); Way, *A Call for Limits to Judicial Immunity: Must Judges be Kings in their Courts*, 64 JUDICATURE 390 (1981); Young, *Supreme Court Report*, 64 A.B.A.J. 740 (1978); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969); Note, *Judicial Immunity: Developments in Federal Law*, 33 BAYLOR L.REV. 351 (1981).

[15] The Conference's limitation to Respondent Allen in this discussion is probably not inadvertent since Allen was incarcerated for the longest period of time.

> view procedures, could have sought federal court review through habeas corpus proceedings.

Brief of the Conference at 14 (citations omitted). The inadequacy of such a remedy as state court habeas corpus review followed by appeal followed by federal habeas corpus proceedings is glaring when it is realized that Respondents were not even able to have an attorney appointed or to receive advice of these or other rights. Instead, they were left in jail pending trial for a non-incarcerable offense with no practical means of contact with the outside world.[16] As this Court has already recognized, such brief, pretrial detentions are, by their very nature, fairly incapable of timely appellate review.

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted.

Gerstein v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975). The same can be said with equal or more force of the inability to obtain state habeas corpus review, appeal of that review, and subsequent federal review through habeas corpus proceedings. Other equally unsuitable "alternatives" offered by Petitioner and her *amici* include removal of judges,[17] *see, e.g.*, Brief of the Conference at 13, election

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[16] Not a single "alternative" was raised at the District Court level, where its factual impossibility, if in doubt, could have been swiftly shown.

[17] Procedures for the removal of judges are hardly an acceptable solution to the preservation of federal constitutional rights. Whatever procedures are provided therefor in Virginia, it can be surmised that Respondents are not in a position to make meaningful use of such procedures. As for the Commonwealth of Virginia itself, the unlikelihood of its proceeding against Petitioner must be indicated by the fact that the Attorney General's Office "vigorously contested" (App-41) the unconstitutionality of these incarceraions based on legal authority which was "anemic" (App-26).

of different judges, *id.* at 14, and criminal prosecution of magistrates and judges, *id.*

This Court has repeatedly recognized that "the congressional scheme . . . makes the federal courts the primary guardians of constitutional rights . . .," *Steffel* v. *Thompson*, 415 U.S. 452, 463 (1974) (quotation omitted), and that through congressional enactment of § 1983 lower federal courts "became the *primary* and powerful reliances for vindicating every right given by the Constitution . . .," *id.* at 464 (quotation omitted) (emphasis in *Steffel*). Federal courts must be willing to step in "where the state courts [are] unable or unwilling to protect federal rights." *Allen* v. *McCurry*, 449 U.S. 90, 101 (1980). To prevent them from doing so by allowing judicial immunity to bar prospective relief would, as Judge Friendly has observed, "leave without a remedy a significant class of the deprivations of federal rights under color of law that Congress intended federal courts to redress under 42 U.S.C. § 1983 . . ." *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 124 (S.D.N.Y. 1969), *aff'd*, 401 U.S. 154 (1971). As this Court has acknowledged with regard to suits against prosecutors, "the denial of injunctive relief may well result in the denial of any effective safeguards against the loss of protected freedoms . . ., and cannot be justified." *Dombrowski* v. *Pfister*, 380 U.S. 479, 492 (1965). Extension of judicial immunity to prospective relief would have the same result and would be similarly unjustified.

Effective federal court safeguards against the violation of federal constitutional rights must be preserved. To the extent that normal channels of appellate review would not suffice to address, much less to remedy, a constitutional violation, the federal courts must retain the

power to do so through prospective relief against state magistrates and judges.[18]

B. Petitioner and her *amici* offer no countervailing justification for an extension of judicial immunity, but rather a proper analysis of the factors they discuss further militates against any such extension.

Petitioner and her *amici* offer three basic arguments to support the extension of judicial immunity. These arguments are: first, that judicial immunity is historical; second, that the failure not to extend judicial immunity will result in harmful consequences to the judiciary; and third, that judicial officers are like legislators. None of these arguments provides any solid ground upon which to base, much less justify, the requested extension of immunity.

1. *The historical derivation and treatment of judicial immunity support its limitation to damages awards.*

Though it is not to be disputed that judicial immunity preceded our democratic form of government, with its common law roots in England's Middle Ages, the actual

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[18] Indeed, many scholars would go much farther than Respondents here urge. Most modern scholars of the doctrine of judicial immunity believe that where, as here, a constitutional violation is not subject to timely correction by the usual channels of appellate review, judicial immunity *from damages awards* should be qualified or abolished. *See, e.g.*, Block, *Stump* v. *Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson* v. *Ray Reconsidered*, 65 NW.U.L. REV. 615 (1970); Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L.REV. 390 (1977); Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978); Nahmod, *Persons Who Are Not "Persons": Absolute Immunity Under Section 1983*, 28 DEPAUL L.REV. 1 (1978); Rosenberg, *Stump* v. *Sparkman: The Doctrine of Judicial Impunity*, 64 VA.L.REV. 833 (1978).

purpose for which the immunity developed supports its limitation in the present case. As Professor Block has discussed in some detail,[19] and as other scholars of the doctrine have also noted,[20] judicial immunity was founded as a result of the institution of appellate review. In order to discourage the older practice of challenging judgments by challenging the judge, and to enforce the new system, judicial immunity was developed.[21] It was subsequently expanded by Lord Coke for the purpose of giving one type of rival court an advantage over another.[22] In this context Lord Coke first enunciated the now familiar justification of independence of the judiciary, from the Star Chamber and, in fact, from all but "God and the King," further noting that without such immunity, "there will never be an end of causes . . . ." *Floyd* v. *Barker*, 77 Eng. Rep. 1305, 1306-07 (K.B. 1607).

This concern for "an end of causes," to be served by following the appellate system rather than circumventing it by suing the judge collaterally, is reflected in the holdings of this Court in *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1982), and *Pierson* v. *Ray*, 386 U.S. 547 (1967). In both cases this Court noted the existence of alternative remedies for the aggrieved parties, and actually the parties in *Pierson* had already achieved correction of the unconstitutional convictions at the time they sought damages.[23] Thus, the original purpose for judicial immun-

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[19] Block, *Stump* v. *Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879.

[20] *E.g.*, Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Way, *A Call for Limits to Judicial Immunity: Must Judges be Kings in their Courts*, 64 JUDICATURE 390 (1981).

[21] Block, *supra*.

[22] *Id.*

[23] For further discussion on this point, see pages 18-19, *supra*.

ity certainly warrants no expansion of the doctrine, particularly into areas where constitutional violations are incapable of correction through the very appellate process which spawned the doctrine.[24]

Nor does the history of the doctrine in America give support for extending judicial immunity to suit for prospective relief. Our American jurisprudence, as developed by this Court, has to date always confined judicial immunity to actions for damages while allowing suits for prospective relief against judicial officers. *See, e.g., Mitchum* v. *Foster*, 407 U.S. 225 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, as reflected in this Court's language in *Mitchum* v. *Foster*, Congress *did* intend through § 1983 to provide for suits for prospective relief against judicial officers.

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative or judicial. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions . . .

Id. at 242 (citation and quotation omitted). This recognition led the Court in *Mitchum* to a determination that § 1983 nad, therefore, created an exception to 28 U.S.C. § 2283, which otherwise would have barred injunctions against state courts.[25] There was no suggestion that any

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[24] Such has been the conclusion of an apparent majority of scholars of the doctrine, as discussed at pages 23-24, *supra*, and note 18, *supra*. In fact, as discussed in 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 226-39 (7th ed. 1956), judicial immunity did not prevent English courts from enjoining lower court judges.

[25] For a more complete discussion of this point, see pages 11-16, *supra*.

source other than § 2283 might give rise to an immunity from injunctive relief. Thus, the *Mitchum* decision evidences the understanding, so often reflected elsewhere, that the traditional concept of common law judicial immunity was limited to awards of damages.

Finally, the Constitution and the concept of separation of powers which are the bedrock of our government both warrant immunity for the judiciary no greater than that accorded either of the other branches. Although the independence of the judiciary has often been cited as the doctrine's main underpinning, certainly the independence of the judiciary from the judiciary can hardly be more important to our balanced form of government than the independence of the executive branch from the judiciary. Yet even the President of the United States, whose "immunity derives from *and is mandated by* the constitutional doctrine of separation of powers," *Nixon* v. *Fitzgerald*, 102 S.Ct. 2690, 2706 (1982) (Burger, C.J., concurring) (emphasis added), is given less immunity than is being sought by Petitioner and her *amici* for all state magistrates and judges. The immunity given the President of the United States "is limited to civil damage claims." *Id.* at 2707. Certainly, to extend judicial immunity beyond that accorded the highest official within the executive branch as well as beyond that accorded all lesser executive officials, *see, e.g.*, *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), would be at best unseemly.

A greater degree of immunity for legislators than that accorded the judiciary is even more appropriate. In addition to the separation of powers principle, the framers of the Constitution made specific and singular reference to the immunity of that branch of government. *See* U.S. CONST. art. I, § 6, cl. 1; *Dennis* v. *Sparks*, 449 U.S. 24

(1980) (recognizing the Speech or Debate Clause as an important distinguishing feature between the treatment of legislators and that of judges even at the state level).

Consequently, a thorough review of history confirms the traditional immunity of judges from damages awards but supplies absolutely no basis for extending that immunity to bar prospective relief, particularly for that narrow range of cases in which constitutional violations cannot be challenged on appeal.

2. ***Inconvenience to judicial officers from this Court's allowance of suits for prospective relief is minimal, and is in many respects less than that experienced by executive officers.***

Petitioner and her *amici* postulate considerable adverse impact should this Court now decline to extend judicial immunity beyond any point it has never been extended in the two centuries of this country's history. Many of these concerns are actually protestations not over the harm by prospective relief but over the purported impact by the concomitant award of attorneys' fees which they compare to damages. Their arguments are flawed.

First, congressionally enacted court costs should not enter into the decision whether judicial officers are or are not immune from prospective relief. Certainly it would constitute a clear violation of Congress' intent for this Court to carve out an entire class of defendants from § 1983 altogether simply in order to avoid the concomitant award of attorneys' fees which Congress intended to accompany that section. Section 1988 was enacted to "close a loophole in our present civil rights enforcement laws," 122 CONG. REC. 32,185 (1976) (remarks of Sen. Tunney), not to create one.

Second, this Court has already squarely rejected the argument that attorneys' fees equal damages, in *Hutto* v. *Finney*, 437 U.S. 678 (1978). *Accord Maher* v. *Gagne*, 448 U.S. 122 (1980).[26] Only upon this rejection could this Court, in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), conclude that prosecutors who are absolutely immune from damage awards, *Imbler* v. *Pachtman*, 428 U.S. 409 (1976), are nonetheless appropriate candidates for § 1988 attorneys' fee awards when prospective relief is obtained against them.

Third, unlike the case with damages, a judicial officer has considerable control over the amount of court costs which might be assessed against him. It is within his ability to render such awards virtually *de minimus*. The present case offers a clear example. The question of the constitutionality of incarcerating persons awaiting trial for a non-incarcerable offense was "vigorously contested" (App-41) on the basis of virtually no legal authority.[27] Had the unconstitutionality of the practice by Petitioner been conceded at the outset of the case, rather than $7500 total in attorneys' fees and costs, the amount could have been virtually nothing. Respondents did not seek damages for

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[26] Even as the seeds of judicial immunity were being sown and judges becoming immune from damages liability, judges were nonetheless subject to court costs, called "amercements," considered wholly distinguishable from damages. Block, *supra* note 19, at 881 & n. 12.

[27] As the District Court's opinion noted:

> Of the four cases cited [in support of Petitioner], only a 1896 case from the Texas Court of Criminal Appeals, *Ex Parte Ferrell*, 37 S.W. 328 (1896), is remotely on point. This one paragraph opinion upholds the incarceration of a defendant on a fornication charge after he was unable to post a $150 bail. No constitutional issues were addressed; nor was it clear from the opinion whether the offense carried a jail time.

(App-26-27).

past misconduct. They sought only correction of a glaringly unconstitutional practice to which they were repeatedly subjected. Yet they were forced to invest considerable attorney time and some expense to obtain this result.

Finally, awards will be granted only when a litigant prevails. In fact, were a case sufficiently vexatious and unwarranted as these postulated by Petitioner and her *amici*, a civil rights litigant could himself face payment of court costs, including attorneys' fees. *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). Thus, judicial officers have no reason to fear that § 1988 attorneys' fees will be awarded in meritless and vexatious litigation.

All remaining concerns by Petitioner and her *amici*, involving interference with duties, distraction, and time, are the same as or similar to those which have been presented to this Court in a number of recent cases in which such concerns have failed to justify unlimited immunity. *See Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982); *Dennis* v. *Sparks*, 449 U.S. 24 (1980); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

For example, *Imbler* v. *Pachtman* presented concerns "that harassment by unfounded litigation would cause deflection of [a] prosecutor's energies from his public duties, and the possibility that he would shade his decisions. . . ." *Id.* at 423. The Court observed that, "[t]he office of public prosecutor is one which must be administered with courage and independence." *Id.* Although these concerns led in *Imbler* to absolute immunity from damages for prosecutors, this Court has held that prosecutors are not immune from suits for prospective relief notwithstanding these concerns, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), for which suits § 1988 awards are

appropriate, *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980).

Similar concerns were expressed in *Dennis* v. *Sparks*, *supra*. It was argued that allowing a claim based on conspiracy with a judge would very likely require a judge to be a witness to defend his behavior, would subject the judge to public humiliation, and would cause judicial immunity to be "seriously eroded." *Id.* at 29. The Court was mindful of these concerns, recognizing that "testifying takes time and energy that otherwise might be devoted to judicial duties," and even that "the judge's integrity and that of the judicial process may be at stake in such cases." *Id.* at 30-31. Nonetheless, it recognized that "judicial immunity was not designed to insulate the judiciary from all aspects of public accountability." *Id.* at 31. As the Court explained:

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being *mulcted for damages* should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding . . ., . . . in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others. These concerns are not insubstantial, . . ., but we agree . . . that *the potential harm from denying immunity is outweighed by the benefits of providing a remedy.* . . .

Id. at 31-32 (emphasis added).

There are a number of special reasons, in addition to those discussed previously, why Petitioner's concerns are clearly outweighed by the benefit of providing a way to address and cure certain constitutional violations like those suffered by Respondents.

First, in stark contrast to a situation in which judges would be subject to suit for damages for any past violations, the number of suits seeking prospective relief will be relatively few. There are two important limiting factors. One factor is the limitation of the relief itself. The fact that the greatest and only award a litigant can receive is correction of a wrong but no compensation will itself act to sift out the meritless claims from the meritorious. And confinement to prospective relief necessarily forecloses those limitless opportunities for suit presented by ability to sue a judge retroactively for any past constitutional violation.

The other factor is the substantial limitation which this Court has already placed on suits for prospective relief against judges. This Court could not have made clearer that only in the most extreme circumstances can a federal court interfere with an ongoing state proceeding. The applicable limiting doctrine is *not* judicial immunity. It is the combined notion of federalism, comity, and equitable restraint, as this Court set forth in *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Samuels* v. *MacKell*, 401 U.S. 66 (1971). This limitation precludes suits for prospective relief in cases in which constitutional violations should be corrected on appeal, although, as noted in *Allen* v. *McCurry*, 449 U.S. 90, 101 (1980), federal courts are expected to step in "where the state courts [are] unable or unwilling to protect federal rights." *Accord Steffel* v. *Thompson*, 415 U.S. 452 (1974). Possibly as a result of these limiting factors, the State of Minnesota *et al.* as

Amici Curiae were only able to locate fourteen such cases currently pending anywhere in these fifty States. Brief of the State of Minnesota, *et al.*, at 2.

Second, the function of judicial officers, unlike that of officers of any other branch of government,[24] is particularly compatible with suits for prospective relief. A judge's function already involves record-keeping. Thus, suits for prospective relief based on a judicial act within a judge's jurisdiction[25] should generally involve little more than a legal review of the preexisting record. Such cases would seldom involve extensive depositions and lengthy evidentiary hearings, as the record would dispose of most factual matters. Rather, as in the present case, the judicial officer would probably never even appear in court. Moreover, judges, unlike other governmental officials or other professionals, are already accustomed to having their actions reviewed by other courts, through appeals, habeas corpus petitions, writs of certiorari. They are already used to having other courts review the correctness of their actions by review of their records. An injunction "no more affects judicial independence than does the possibility of reversal. . . ." Brief of ABA at 2. Instead, "it would furnish a definitive ruling on a point of federal law for [a judge's] future guidance. . . ." *Law Students*

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[24] This Court has properly noted that discussions of judicial immunity apply with equal force to administrative hearing examiners, under a functional rather than status approach to judicial immunity. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 511-13 (1978).

[25] Non-judicial acts or acts in a total absence of jurisdicton, for which there is not judicial immunity, *Stump* v. *Sparkman*, 435 U.S. 349 (1978), are most likely to be the very acts for which there would be no record. *Cf. Gregory* v. *Thompson*, 500 F.2d 59 (9th Cir. 1974) (involving a physical assault by a judge on a spectator in his courtroom, which the Ninth Circuit deemed not a judicial act in part because it was not subject to review on appeal).

Civil Rights Research Council, Inc. v. *Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969). Any effect on a judge's decision-making would presumably be for the better, just as a reversal by a higher court would presumably create better decision-making in the future.

On those rare occasions when judicial officers are sued for prospective relief for violations of constitutional rights which cannot be cured through the appellate process, such officers have to face little more than, as in this case, notifying the government attorneys assigned to represent them,[30] tendering the record, and, if they lose, looking to the state or local government for payment of any court costs assessed against them.[31] There is therefore truly little to distinguish a suit for prospective relief from normal appellate review. In neither case does the judicial officer lose anything personally, and in both cases his actions are reviewed and possibly declared constitutionally infirm by another court. Thus, suits for prospective relief fit appropriately and without overlap to fill the gap otherwise left for cases in which the constitutionality of a judge's actions cannot be addressed on appeal. The inconvenience that might be caused to the judicial officer clearly cannot begin to outweigh the bene-

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[30] As has been noted by the State of Minnesota, *et al.*, the offices of the attorneys general "[i]n virtually all of the states, . . ., have responsibility for defending actions against judges." Brief of the State of Minnesota, *et al.*, at 2. § 16.1-69.39:1 of the Code of Virginia provides, in pertinent part: "All legal services for personnel of the district courts or magistrates in civil matters, including civil litigation, arising out of the performance of their duties, shall be provided by the office of the Attorney General." VA. CODE ANN. § 16.1-69.39:1 (1982 Repl. Vol.).

[31] Section 1988 clearly envisions such indemnification. *See* S. REP. No. 1011, 94th Cong., 2d Sess. 5 (1976).

fit to the public in being able to obtain the correction of constitutional violations otherwise beyond federal review.

3. *Judicial officers are not entitled to the ultimate immunity accorded legislators.*

As this Court recognized in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), legislators are accorded the most extreme, blanket immunity, from damages and from prospective relief, for their legislative acts. *Consumers Union*, 446 U.S. at 731-32. Petitioner and her *amici* therefore argue in support of an extension of judicial immunity that judicial officers are like legislators. *See, e.g.*, Brief on Behalf of Petitioner at 17-18. There is no legitimate support offered for this contention but rather the argument is circular. Judicial officers need immunity from prospective relief, it is argued, as do legislators. Therefore, they are like legislators and, therefore, they are immune from prospective relief.

However, there are at least three reasons why judicial officers are not entitled to the ultimate immunity provided legislators. First, unlike any other branch of government, the legislative function was singled out by the framers of the Constitution for special immunity protection by its Speech or Debate Clause. U.S. CONST. art. I, § 6, cl. 1. While this provision applies to Congress, not to state legislators, "legislative immunity at the state level serves the same policies that are of constitutional magnitude at the federal level." Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 245 (1978). Accordingly, "the scope of state legislative immunity for purposes of § 1983 has been patterned after immunity under the Speech or Debate Clause." *Dennis* v. *Sparks*, 449 U.S. 24, 30 (1980). As this Court recognized

in *Dennis*, "there is no similar constitutionally based privilege immunizing judges. . . ." *Id.*

Second, the separation of powers cautions against suits before the judiciary against members of the legislature. Thus, "legislative immunity is also constitutionally based to the extent that at least the rudiments of separation of power principles must be protected from federal interference." Nagel, *supra*, at 245. As Chief Justice Burger emphasized in *Nixon* v. *Fitzgerald*, 102 S.Ct. 2690 (1982), while the separation of powers "mandate[s]" immunity for other branches of government, *id.* at 2706, "the Constitution provides no hint that either judges, prosecutors or Congressional aides should be so protected," *id.* at 2707 n.2. In fact, as has already been discussed, were this Court to extend immunity for judicial officers so as to be co-extensive with that of legislators, such immunity would surpass that accorded the executive branch, which has a constitutional basis in the concept of the separation of powers. *Cf. Butz* v. *Economou*, 438 U.S. 478, 528 n. (Rehnquist, J., dissenting) (noting the "irony" of such incongruous treatment).

Third, and most important, this Court's granting legislators the most complete, extreme immunity possible for their legislative acts does not create a gap in the justiciability of constitutional claims analogous to that which would be created by such immunity for judicial officers. As has been discussed above, were this Court to extend judicial immunity to prospective relief, federal courts would be powerless to protect certain constitutional rights. A class of constitutional violations, as those involved in the present case, would be placed effectively beyond the review of such courts. Yet legislative acts rarely create the kind of constitutional insults and abuses to individuals of which the executive and judicial bran-

ches are capable. Moreover, any such abusive legislation can be challenged without suit against the legislator himself, as by challenge against the enforcement of the unconstitutional act. *See, e.g., Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

Thus, the argument that judicial immunity should be extended to prospective relief because legislators are granted that ultimate immunity is an empty one.

C. Immunity from damages is provided to judges and prosecutors to protect the integrity of the judicial process; to the same end, judges, like prosecutors, are subject to suit for prospective relief in the narrow range of cases in which it is necessary to protect federal constitutional rights.

As established above, the doctrine of judicial immunity can hardly derive any modern day justification from its historical purpose to enforce appeals. Nor can such justification be derived from a need for independence from the Star Chamber nor from the Constitution nor from the separation of powers principle. In fact, of the three branches of government, the immunity given the judiciary is based on justification which has been deemed of singularly "mysterious" origin. Nagel, *supra*, at 245.

Yet the mystery is resolved upon recognition that judicial immunity is but one of a number of immunities provided to protect the judicial process, as this Court explained in its recent decision in *Briscoe* v. *Lahue*, 103 S.Ct. 1108 (1983).

In *Briscoe*, the Court squarely rejected, as it had previously, *see, e.g., Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980); *Stump* v. *Sparkman*, 435 U.S. 349 (1978), an immunity analysis based on status for one based on function. Such functional analysis leads to

the conclusion, as it led this Court in *Briscoe*, that judicial immunity is but one immunity which this Court has provided as a buffer around the truth-finding, decision-making process. Others include immunity for prosecutors, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), grand jurors, *id.* at 423 n. 20, and witnesses, *Briscoe*.

On this point, this Court could hardly have been clearer.

> The common law's protection for judges and prosecutors formed part of a "cluster of immunities protecting the various participants in judge-supervised trials," which stemmed "from the characteristics of the judicial process." *Butz* v. *Economou; cf. King* v. *Skinner*, 98 Eng. Rep. 529 (K.B. 1772) ("Neither party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office.")

Briscoe at 1115-16 (citations omitted). The Court recognized that, without such immunity, "[a] witness's apprehension of subsequent damages liability might induce . . . censorship." *Id.* at 1114. Such a witness "who knows that he might be forced to defend a subsequent lawsuit, and perhaps pay damages, might be inclined to shade his testimony in favor of the potential plaintiff. . . ." *Id.* at 1115. Furthermore, "[t]he loser in one forum will frequently seek another. . . ." *Id.* at 1116, *quoting Butz* v. *Economou*, 438 US. at 512.

These concerns are echoes from this Court's earlier decision in *Imbler* v. *Pachtman*, where it observed that "[t]he common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors. . . ." *Id.* at 422-23. Those considerations included:

> concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies

> from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id. at 423. They also included the concern that "[t]he apprehension of such [civil suits] would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office." *Id.* at 424 (quotation omitted).

> In short, the common law [has] provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process.

Briscoe, 103 S.Ct. at 1116. As a result, this Court has repeatedly referred to the immunity of judges and prosecutors as alike. *See, e.g., Nixon* v. *Fitzgerald*, 102 S.Ct. at 2700, 2703 & 2706 (1982) ("For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy . . .," at 2706). Both immunities stem from the same source, the nature of the judicial process. *Briscoe*.

Yet, while this Court has never specifically addressed the question of whether this immunity extends to bar prospective relief against a judge or magistrate, it has clearly done so with regard to a judge's counterpart, another participant in the process, a prosecutor. *See Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). And it has equally clearly acknowledged that this immunity derived from the judicial process does *not* extend to prospective relief. *Id.* Application of the functional rather than status approach to immunity for participants in the judicial process leads to the result that other participants in that process, including judges, should have the same

immunity from damages liability but not from prospective relief. Accordingly, for those rare occasions when such prospective relief would be otherwise appropriate, would be necessary for protection of constitutional rights, and would not run afoul of concerns of federalism and comity prohibiting unwarranted intrusion into ongoing state proceedings, *Younger* v. *Harris*, 401 U.S. 37 (1971), there must be no immunity bar to such relief.

The immunity from damages, provided to those involved in the court process, may be seen to serve a salutory purpose, even when, as in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), it creates a harsh result. Yet an equally salutory purpose is served by allowing prospective relief and concomitant attorneys' fee awards in those unusual situations, like the present case, where a violation of a federal constitutional right would be otherwise incapable of federal review. Such a balance between immunity from damages on the one hand and amenability to suit for prospective relief on the other would represent an appropriate accommodation of conflicting interests. Moreover, it would also serve the compelling purpose of confirming, as for Respondents Richmond R. Allen and Jesse W. Nicholson, that, while prosecutors and judges in this country are accorded a most powerful exemption from the common law system of tort liability, they are not above the Constitution they serve.

CONCLUSION

Congress intended § 1988 to apply to cases in which prospective relief is obtained, including against judicial officers. Any exemption of judicial officers from the plain

language of § 1988 would be a clear contravention of Congress' intent.

Furthermore, an extension of judicial immunity to prospective relief is unjustified. The benefits to our judicial system in allowing suits for prospective relief against judges clearly outweigh any inconveniences caused thereby.

Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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No. 82-1432

In The

Supreme Court of the United States

October Term, 1983

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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In The

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GLADYS PULLIAM, Magistrate for
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Respondents.

REPLY BRIEF FOR PETITIONER

This case involves a judicially created immunity, one which will not be found embodied in any compilation of statutes. As in the case of legislative and executive immunity, judicial immunity was formulated and developed through the Common Law. It is based on policy considerations. Like any Common Law or judicially created doctrine, it can also be altered by discrete legislative action. In the absence of such action, however, it is the role of the judicial branch of government to define its parameters.

ARGUMENT

1.

Judicial Immunity Bars Suits Seeking Prospective Relief.

Respondents approach this case with beguiling simplicity. Respondents' principle argument is a syllogism as follows:

The Supreme Court has reviewed cases in which judges were subjected to suits for prospective relief under 42 sp. U.S.C. § 1983.

Congress has enacted legislation which authorizes prevailing parties in 42 U.S.C. § 1983 actions to receive attorneys' fees payable by the losing party.

Therefore, judges must pay attorneys' fees when they lose a 42 sp. U.S.C. § 1983 suit.

The fatal flaw in this syllogism, as in many syllogisms, is that the conclusion is a non sequitur, that is it does not necessarily follow from the premises.

Although suits against judges have been before this Court on previous occasions, this case is the first opportunity the Court has had to fully explore and treat the doctrine of judicial immunity as it applies to actions seeking only prospective relief and demands for attorneys' fees under 42 U.S.C. § 1988. Contrary to Respondents' implication, the Court has never suggested that judges are subject to suit for injunctive or declaratory relief over a defense of judicial immunity. Indeed, just three years ago in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 735 (1980), the Court agreed that "we have not addressed the question" (footnote omitted) of absolute judicial immunity from declaratory and injunctive relief.[1]

The Court has clearly held that judges are absolutely immune from suit for damages arising out of their judicial functions. *Stump* v. *Sparkman*, 435 U.S. 349 (1978). This

[1] In *Consumers Union*, the Court acknowledged that it had considered cases in which members of the judiciary were defendants but in those cases the Court did not confront the question presented in this case. *See Consumers Union*, 446 U.S. at 735.

In *dicta*, however, the Court has, on many occasions, stated the proposition of judicial immunity broadly. For example in *Briscoe* v. *Lahue*, ____ U.S. ____, 103 S. Ct. 1108, 1115 (1983), the Court stated, "We have held that state judges are absolutely immune from liability for their judicial acts . . ." without indicating a limitation on the scope of the immunity.

immunity flows from the rich tradition of the Common Law. In *Pierson* v. *Ray*, 386 U.S. 547 (1967), this Court held that Congress, by the enactment of 42 U.S.C. § 1983, did not intend to permit a damage award against judges because of the doctrine of judicial immunity. The Court reached this conclusion although neither the language nor legislative history of § 1983 specifically outlawed such an award.

Utilization of the functional analysis suggested in *Briscoe* v. *Lahue*, ___ U.S. ___, 103 S.Ct. 1108 (1983) for determining the proper application of an immunity doctrine compels a conclusion that judges are immune from suits arising out of their judicial acts and seeking declaratory and injunctive relief just as they are immune from suits seeking only damages. A suit attacking a judge and alleging an abuse of his judicial function obviously must be premised upon and focus on the judge's past judicial actions regardless of the nature of relief sought. The judge's function does not fluctuate depending upon whether a dissatisfied litigant may threaten him in the future with a suit for equitable relief rather than one for damages. Rather, the judge's role remains constant, to preside over the judicial process and make the often times difficult decisions upon which the effectiveness of our legal system depends.

Respondents nevertheless imply that subjecting judges to injunctive and declaratory actions would not harm the judiciary because the relief is merely "prospective." At best, such a notion is naive. The nature of the relief sought in a lawsuit frequently becomes inconsequential to the struggle of the litigants to vindicate themselves and claim victory over their perceived oppressor. Indeed, this case provides a clear example of how suits seeking prospective relief still must focus upon the past actions of the judge.

The effect of a judge's having to participate personally in the defense of a lawsuit in which he is named as a defendant[2] is substantially different from watching one's decision being reviewed by an appellate court. As this Court noted in *Briscoe*, even when the government provides counsel, "a case that goes to trial always imposes significant emotional and other costs on every party litigant." ___ U.S. ___, 103 S.Ct. at 1120. The effect of forcing judges to endure such actions will be chilling.

Respondents' suggestion that only a few suits will be filed against judges is contrary to logic, past experiences and present trends. Only twelve years ago, a profusion of suits seeking federal court injunctions against State prosecutions led this Court to decide *Younger* v. *Harris*, 401 U.S. 37 (1971). In *Briscoe*, the Court predicted that, if immunity was not granted to police officer witnesses, § 1983 lawsuits against them, "like lawsuits against prosecutors 'could be expected with some frequency' " because police officers annually testify in scores of cases. 103 S.Ct. at 1119-1120 This Court recognized in *Briscoe* that defendants in criminal cases will often transform resentment at being convicted into allegations of perjury by the state's official witnesses. How much greater would be the profusion of suits against judges who preside over all judicial proceedings and personify the state?[3] Under the reasoning of *Butz* v. *Econo-*

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[2] In the instant case, the Complaint did not distinguish between suing Magistrate Pulliam in her official capacity or in her personal capacity.

[3] A recent survey by the National Center for State Courts' Research and Information Service reveals that the trend of suits against judges is already building. In 1981 alone, more than 600 actions were initiated against judges or court personnel. Ito, *A National Survey Shows Wide Variations in Actions Against Court Personnel*, 6 St. Ct. J., No. 3, Summer, 1983 at 9, 14.

mou, 438 U.S. 478 (1978), federal judges will likewise be subject to suits.

Contrary to Respondents' suggestion, if suits are permitted against judges, the suits would not be limited to vindication of "constitutional" torts. Rather, under *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), suits brought under 42 U.S.C. § 1983 can be founded upon statutory as well as constitutional bases. Thus, there will doubtlessly be many suits, not just a select few.

If this Court sanctions the use of injunctive and declaratory suits against judges, dissatisfied litigants and those dissatisfied with our nation's criminal justice system will surely accept the Court's invitation to seek vindication against judges through additional litigation. Regardless of whether the plaintiffs are motivated by malice, judges will be harassed by a new wave of angry, questioning litigants who will seek personal vindication. Merely terming the relief sought as "equitable" or "prospective" does not diminish the fact that the ensuing second round of litigation, and the trial, will normally focus upon the judge's past acts. Nor will it diminish the "significant emotional and other costs" which the judge will endure each time he is sued.

2.

Judicial Immunity Bars An Award Of Attorneys' Fees Against A Judge For Acts Undertaken In His Judicial Capacity.

If the Court in this case decides to avoid the larger issue of the scope of judicial immunity or even if it concludes that judicial immunity does not preclude suits against judges for injunctive or declaratory relief, Petitioner submits that the Court should still hold that judicial immunity precludes an award of attorneys' fees.

In ***Edelman*** **v. *Jordan***, 415 U.S. 651 (1974), the Court

carefully examined the substance of a lower court's award which the lower court had described as "equitable restitution." This Court was not misled by the misnomer and held that the award was "in practical effect indistinguishable in many aspects from an award of damages. . . ." 415 U.S. at 668. The same analysis should be applied in this case because, insofar as the judge-defendant is concerned, an award of attorneys' fees against him is tantamount to an award of damages. Terms such as "ancillary relief" should not be permitted to disguise the effect upon a judge of having an award of attorneys' fees entered against him. Such an award is measured in dollars just as in an award of damages. With the increasingly complex litigation clogging our federal courts, the cost of attorneys' time may often exceed the measure of relief obtained. In such cases, awards of attorneys fees, even if initially covered by insurance or the government, are likely to be just as intimidating and inhibiting to the judiciary as an award of damages. It is this inhibiting effect which must be avoided if the judiciary is to continue its strong, independent role.

Hutto v. *Finney*, 437 U.S. 678 (1978), does not counsel a different result. In that case, the Court carefully reviewed the legislative history of 42 U.S.C. § 1988 and concluded that, by that Act, Congress had repealed the Eleventh Amendment immunity of states to the extent, if any, that the states had previously enjoyed such immunity against the payment of costs and attorneys' fees. The legislative history was plain that Congress had intended such a result. In addition, this Court found that "costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity." 437 U.S. at 695.

Following the analysis used in *Hutto* of legislative history and tradition, one can only conclude that the judiciary

is still protected by judicial immunity from awards of attorneys' fees. There is nothing in the legislative record of 42 U.S.C. § 1988 which shows any "plain" intent to subject judges to the Act or to repeal the doctrine of judicial immunity.[4] Likewise, there is no tradition of awarding costs, be they attorneys' fees or otherwise, against judges because judges have not traditionally been subjected to suit.

Finally, respondents' cry that a holding of absolute judicial immunity will deprive them of any remedy is disingenuous.[5] This Court has answered that point repeatedly and as recently as last term in *Briscoe*. Any situation involving an immunity defense, even a defense of qualified immunity, necessarily subordinates an individual's desire for redress to the broader public interest. As this Court held in *Briscoe*, quoting from *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. den.* 339 U.S. 949 (1950):

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

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[4] See discussion of legislative history in Brief On Behalf of Petitioner, pp. 23-29.

[5] The primary answer to this concern is that set forth *infra*. There are, however, remedies as discussed in Brief of Petitioner, p. 16. In addition, there are many situations in which the Eighth Circuit's holding in *R.W.T.* v. *Dalton*, 712 F.2d 1225 (8th Cir. 1983), would be applicable. In that case, the court held that prospective relief could be obtained by naming as defendants governmental officers such as juvenile officers or other executive branch officials, rather than judges, thereby preserving the principles of judicial immunity, comity and federalism.

CONCLUSION

Magistrate Pulliam, the American Bar Association, the Conference of Chief Justices and forty-nine of our Nation's fifty states urge this Court to continue its support of the principles underlying the policy of judicial immunity. That doctrine has permitted our judiciary to uphold, fearlessly, for two centuries, the rule that we are a Nation of law.

Accordingly, Petitioner urges this Court to reverse the judgment of the Court below and enter final judgment on her behalf.

Respectfully submitted,

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By: _____

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

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No. 82-1432

In the Supreme Court
of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM, Magistrate for the
County of Culpeper, Virginia,
Petitioner,

vs.

RICHARD R. ALLEN, and
JESSE W. NICHOLSON,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

The American Bar Association (hereinafter A.B.A.) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of petitioner that the decision below should be reversed. Consent to file this brief has been sought from the parties and granted by petitioner, but counsel for respondents has refused to consent. It is therefore necessary to request leave of this Court to file the accompanying brief, pursuant to Rule 42.

The constituency of the A.B.A. includes legal professionals from every state and territory and the District of Columbia in all fields of legal endeavor. This breadth of experience and concern has prompted the A.B.A. to file briefs *amicus curiae* with this Court on numerous occasions.

This case is of substantial importance to the A.B.A. because of its longstanding interest in the proper administration of justice and the concern on the part of the Judicial Administration Division that judicial immunity would be seriously endangered by a decision affirming the court below. The A.B.A. has concluded that the integrity of our legal system and the objectivity and independence of our courts would suffer by such a decision.

The A.B.A. believes the accompanying brief will be of assistance to the Court because of its broad based experience in matters affecting the administration of justice.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Bar Association (hereinafter A.B.A.) is a voluntary, national membership organization of the legal profession. Its nearly 285,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legis-

lators, law professors, law students, and a number of nonlawyer "associates" in allied fields. Since its inception 105 years ago, the A.B.A. has taken an active interest in the improvement of the administration of justice.

The A.B.A. is convinced that sensitive issues of great public importance are at stake in this case, and that the Court's decision may have widespread consequences for both the Bench and the Bar. The issue in this case is whether judges are subject to fee awards under 42 U.S.C. § 1988 for their judicial acts. The implications of this question alone are far reaching, given § 1988's broad application. But, as this brief's argument will demonstrate, the impact of this case will reach far beyond § 1988 to virtually every fee shifting provision in federal civil rights law. The consistency with which these various fee provisions have been interpreted is testimony to the important precedent that will be established in this case.

The A.B.A. strongly endorses the Congressional commitment to enforcing civil rights that is evident in § 1988. However, the A.B.A. also recognizes the need to preserve the independence and integrity of the judicial system through which those rights are vindicated. Attorney fee liability for judicial action threatens the independence of the judiciary by raising the possibility that judicial decisions may be affected by concern over personal financial liability. Preserving faith in the objectivity of our judiciary depends on insulating their judgment from the burdens and risks of litigation.

SUMMARY OF ARGUMENT

The possibility that judges may be required to pay attorney's fees is an unacceptable threat to judicial independence and impartiality. Fee awards simply are not distinguishable from monetary damages for immunity purposes. It does not follow from the fact that judicial conduct may be enjoined in some circumstances that judges also may be required to pay damages or attorney fees. The former remedy no more affects judicial independence than does the possibility of reversal, but a monetary sanction would strike at the heart of neutral and detached decision making. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), is not to the contrary; it holds only that fees may be imposed on judges acting in an administrative enforcement, not a judicial, capacity. And no case other than the one at bar holds that judges may be made personally liable for attorney's fees because of acts of a purely judicial character.

Neither the language nor the legislative history of § 1983 reveals an intention to abrogate judicial immunity. The language is silent as to that. The history establishes an intention to resurrect the practice of many courts before this Court's decision in *Alyeska Pipeline Service Corp.* v. *Wilderness Society*, 421 U.S. 240 (1975), of awarding fees in actions brought under § 1983 in some circumstances, but that practice has never gone so far as to abrogate the immunity of judges for their judicial conduct.

ARGUMENT

A. The policies underlying the immunity of judges from paying damages for their judicial acts apply equally to subjecting judges to attorney's fees under § 1988.

The centuries-old doctrine of judicial immunity has enjoyed unqualified support in Supreme Court jurisprudence. Beginning with *Bradley* v. *Fisher*, 80 U.S. (13 Wall) 335 (1871), the Court has repeatedly affirmed the crucial importance of insulating judicial decision-making from the fear of liability, harassment by unsatisfied litigants and the burdens of defending civil actions. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Ferri* v. *Ackerman*, 444 U.S. 193 (1979); *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690 (1982). "Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice . . . [for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself'." *Stump* v. *Sparkman*, *supra*, at 363 (quoting from *Bradley* v. *Fisher*, *supra*). This reasoning also applies to awards of attorney fees under § 1988.

This Court has recently noted in *Hensley* v. *Eckerhart*, 51 U.S. Law Week 4552, 4555 (1983), that "complex civil rights litigation" may be "lengthy and demand many hours of lawyers' services." Both that case

and this one arose under § 1983. Attorney's fees may be substantial. The fees awarded by the District Court in *Hensley* amounted to $133,230. But even the $7,308 awarded in this case can impose a substantial burden on a state magistrate or judge.

The broad and uncertain scope of exposure under § 1988 and the uncertain magnitude of the possible fees which might be imposed would further enhance the intimidating effect of § 1988 if judges were required to pay fees. Although conscientious judges may resist or disregard the possibility of such fees, such a concern should not be allowed even to enter their minds before they decide a case one way or the other. The potential for personal liability for attorney's fees should not be permitted to threaten principled decision-making.

The threat of fee exposure is not lessened by the possibility that fee awards may be paid from public funds. Not all states so provide, and in those that do, indemnification statutes reveal widely varying and discretionary standards for indemnifying the defendant judge. Exclusions abound for "intentional," "deliberate," or other acts taken in "bad faith." *See*, Murphey, *Judicial Immunity and Indemnification of State Officers and Employees*, National Center for State Courts Memorandum, Ref. No. RIS 83.001 (1982). Because these statutes focus on the state of mind of the actor, they introduce significant uncertainty as to the nature and extent of state protection.

B. The fact that injunctive or declaratory relief may be granted against judges does not mean that they can be required to pay attorney's fees.

The Court of Appeals in this case apparently did not face up to, or even mention any of the above considerations. It seemed to assume that judges could be held liable in attorney's fees because judicial immunity did not preclude the granting of injunctive or declaratory relief (though not damages) under § 1983, and because in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), the Court had held that attorney fees could be awarded against judges for action taken in an administrative enforcement capacity. Although recognizing that this Court had found the Virginia judges immune from liability for conduct in their "legislative capacity," the court below failed to recognize that the same conclusion applied *a fortiori* to the conduct of a court acting in its judicial capacity.

The nature of the act complained of here is clearly judicial. The setting of bail in criminal matters is a well established judicial function entrusted to the courts. As this Court held in *Stump* v. *Sparkman*, 435 U.S. 349, 362-363 (1978), conduct is regarded as judicial for purposes of judicial immunity if it is "the type of act normally performed by judges" and is performed in a judge's "judicial capacity."

The Court of Appeals cases relied upon in the opinion below do not support its position. In *Morrison* v. *Ayoob*, 627 F.2d 669, 672 (3rd Cir. 1980), *cert.*

denied, 449 U.S. 1102 (1981), the Third Circuit noted that fees were being sought against the defendant judges "only in their official capacities." Indeed, the Court noted that "the county and state court administrator" had "entered appearances in the district court and actively participated in all phases of the case", and "arguably could be responsible for the award." *Id.* at 673. Similarly, in *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), which did not involve judges but other local officials, the defendants were sued only in their official capacities.

The ultimate conclusion of the court below was that "because prospective relief was properly awarded against Magistrate Pulliam* . . . [plaintiff] was entitled to an award of attorney fees under 42 U.S.C. § 1988." *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982), at 379. For the reasons stated above, the premise simply does not support that conclusion.

C. Congress did not abrogate judicial immunity to fee awards by enacting 42 U.S.C. § 1988.

This Court's decisions establish beyond doubt that judges are immune from damages liability for their judicial acts. *See*, cases cited at p. 4, *supra*. Although Congress may abrogate this immunity, the cases require a "clear indication" of such intent, a require-

* For this the Court relied upon its own prior decision in *Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975), rev'd on other grounds *sub. nom.*, *Leeke* v. *Timmerman*, 454 U.S. 83 (1981).

ment in no way satisfied by the general language of § 1988. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Briscoe* v. *Lahue*, 51 U.S. Law Week 4247 (1983). "The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson*, *supra*, at 554-555.

No such specific provision clearly indicating that abrogation of judicial immunity was intended can be found in the language of § 1988 or in that section's legislative history. There is no specific reference to judicial immunity in § 1988. To convert such silence into a showing of affirmative Congressional intention to terminate the immunity, the legislative history would have to point in that direction with unquestionable clarity, but the legislative history also contains no specific reference to judicial immunity. If anything, it supports the contrary conclusion.

Senate Report 94-1011, 94 Cong., 2nd Sess., U.S. Code Cong. and Admin. News, 5908 (1976) accompanied S. 2278, the bill which ultimately passed Congress and became 42 U.S.C. § 1988. The Senate Report makes clear that S. 2278 was drafted in response to this Court's holding in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975.)* In *Alyeska*, the Court held that absent a showing of bad faith, federal courts cannot award fees to prevailing

* The House Report shows that the same was true of S. 2278's House counterpart, H.R. 15460. *See*, H. Rep. No. 94-1558, 94th Cong., 2nd Sess., at 2.

parties without express Congressional authorization. The Court thereby disapproved the established federal court practice of exercising equitable power to award fees to prevailing civil rights plaintiffs. S. 2278 was intended to provide the authorization found lacking in *Alyeska*.

The express intent both of S. 2278 and H.R. 15460 was to reestablish, in the wake of *Alyeska*, "the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." S. Rep. 94-1011, *supra*, at 5909-10. *See*, also, H. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976), at 5-6. The emphasis was on the *familiarity* of the remedy.

Both reports expressly adopt the standards developed under the fee provisions of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k). S. Rep. 94-1011, *supra*, at 5912. H. Rep. No. 94-1558, *supra*, at 5. The standards developed under § 402 of the Voting Rights Act Amendment of 1975, 42 U.S.C. 1973(e), and the Emergency School Aid Act of 1972, 20 U.S.C. 1617, also were cited with approval. H. Rep. 94-1558, *supra*, at 5; S. Rep. 94-1011, *supra*, at 5913. Since 1976, numerous cases have construed § 1988 in light of these statutes and repeatedly have held them to be virtually identical. Eg., *Ward* v. *Dearman*, 626 F.2d 489 (5th Cir. 1980); *Johnson* v. *Bd. of Education, City of Chicago*, 604 F.2d 504 (7th Cir. 1979); *Chicano Police Officer's Assoc.* v. *Stover*, 624 F.2d 127 (10th Cir. 1980); *Wheeler v. Durham City Bd. of Ed.*, 585 F.2d 618 (4th Cir. 1978); *Zarcone* v.

Perry, 581 F.2d 1039 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977); *Northcross* v. *Bd. of Ed. of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert denied*, 447 U.S. 911 (1980). Indeed, this Court also has had occasion to equate the meaning of these fee shifting provisions. *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n. 4 (1980).

The explicit Congressional and judicial equation of § 1988 to these fee provisions makes available to this Court a large and decisive body of precedent with which to determine the intent of Congress in enacting § 1988. These precedents reveal no intent whatsoever to abrogate judicial immunity to fee awards.

This conclusion is reinforced by the remarks of S. 2278's supporters on the Senate floor. Time and time again, the Senate was assured that S. 2278 contained "no startling new remedy."

The author of S. 2278, Senator Tunney, expressly approved existing standards for fee awards under § 1988:

> "Mr. President, the action that I ask the Senate to take today is far from unique. Fifty-four Federal statutes presently authorize the award of fees in areas as diverse as antitrust, freedom of information, consumer product safety, banking, international relations, and patents, to name only a few. S. 2278, when enacted, will close a loophole in our present civil rights enforcement laws.
>
> "In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court

expressly stated that the lower Federal courts had no inherent equity power to award attorney's fees in civil rights cases absent statutory direction. *This bill creates the necessary authorization and is addressed to the key questions raised in the opinion.* * * *

"The award, Mr. President, must be reasonable and *the courts have been exceptionally clear in stating their views on this aspect of the problem.* In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) the court of appeals listed 12 factors to be considered in computing the fees * * *

"S. 2278 also provides for awards to the prevailing party, a more moderate approach than limiting recovery to prevailing plaintiffs. This was designed to avoid bringing vexatious or harassing lawsuits by allowing the award of fees to prevailing defendants under those circumstances. *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). At the same time, *existing case law is clear on the point* that prevailing plaintiffs 'should ordinarily recover our attorney's fees unless special circumstances would render such an award unjust.' *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

"Finally, S. 2278 states that the fees are to be allowed in the discretion of the court. That discretion has been included in the most recent civil rights statutes allowing attorneys' fees and *the standards enunciated* in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) *have been more than ample.*" 122 Cong. Record, at 32185. (Emphasis supplied).

Speaking in support of Senator Allen's amendment regarding IRS litigation, Senator Tunney again relied on existing judicial standards for fee awards:

> "Essentially, it would apply to a situation where a taxpayer is harassed by the IRS. In such a case, a court has discretion to award reasonable attorney fees to the defendant. *The standard to be applied is the one the courts have adopted with respect to prevailing defendants, as described in the Senate report.*" *Id.* at 33312. (Emphasis supplied).

Senator Kennedy, a member of the Judiciary Committee and author of an amendment on the floor including Title IX under the provisions of § 1988, also expressly endorsed existing standards:

> "This bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into any new areas which Congress has not previously considered
> * * *
>
> "Furthermore, the bill will not create any new burdens for the courts. *Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision.*" *Id.* at 31473. (Emphasis supplied).

Still another member of the Judiciary Committee, Senator Scott of Pennsylvania, explicitly limited § 1988 awards to those authorized under prior statutes:

> "The enactment of S. 2278 is needed to assure that attorneys' fees will be available in suits brought under the reconstruction-era civil rights

> laws, Title VI of the 1964 Civil Rights Act, and Title IX of the Education Amendments of 1972 *in the same fashion and to the same extent as the statutes presently provide* in some cases brought under Title VII of the 1964 Civil Rights Act." *Id.* at 31471. (Emphasis supplied).

Senator Hathaway reiterated this adoption of established fee shifting principles under § 1988:

> "This bill would add the same type of fee shifting provision contained in portions of every major civil rights statutes which do not specifically authorize fee awards, thereby achieving consistency in the civil rights laws.
>
> "This bill, then, contains no startling new remedy — it only meets the technical requirements that the Supreme Court laid down *if the courts are to continue the practice of awarding attorneys' fees which had been going on for years* prior to the *Alyeska* decision." *Id.* at 31832 (1976). (Emphasis supplied). *See*, also, S. Rep. 94-1011, *supra*, at 5913, which contains the same language.

Both the Senate and House reports on the bills which became § 1988 make reference to the immunities enjoyed by state and local officials. Neither report mentions judicial immunity nor an intent to abrogate it. The Senate report, S. Rep. 94-1011, *supra*, at 5913, states as follows:

> "As with cases brought under 20 U.S.C. Sec. 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it

> is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from State or local government (whether or not the agency or government is a named party)." (Footnotes omitted).

It first should be noted that this statement is prefaced by reference to 20 U.S.C. § 1617. As previously asserted, *amicus* are unaware of any case under that section which holds judicial action susceptible to fee awards. Second, the statement contains no express reference to judicial immunity or its abrogation. Third, the reference to 20 U.S.C. § 1617 and the ordinary type of fee liability for executive misconduct leave this portion of the report best understood as referring to already established executive fee exposure. *See, Consumers Union, supra,* at 739. In any event, this reference to official liability can in no way be construed as a specific provision clearly indicating an intention to abrogate *judicial* immunity.

The House Report on H.R. 15460 has provided the one bare instance of support, however inadequate, for those urging fee liability for judicial acts. The relevant portion of the House Report is as follows:

> "Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such liti-

> gation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." H. Rep. 94-1558, *supra*, at 9.

Footnote 17 to the preceeding quotation cites three decisions by this Court: *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967). On the basis of the House Report's language and reference to *Pierson*, both the court below and the Third Circuit found the requisite Congressional intent to abrogate judicial immunity — although the Third Circuit was careful not to find that judges can be held individually liable. *Morrison* v. *Ayoob*, 627 F.2d 669, 672 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

This language and citation fall far short of the required specific manifestation of intent to abolish judicial immunity. The meaning or significance of the citation to *Pierson* is, at best, ambiguous. *Pierson* established the qualified damages immunity of police officers as well as the absolute immunity of judges. 386 U.S. at 554-557. With respect to the latter, the Court stated: "The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 554-555. To which immunity or "special defense" does the Report refer? The phrase "public officials" does not necessarily include judges. If both were intended, why did the Report not refine the meaning of the reference by citing separate cases standing for each

doctrine? Moreover, having cited *Pierson*, the Report's author certainly was aware of the explicit Congressional expression necessary to abrogate judicial immunity. Why then was specific mention not made of the immunity, as *Pierson* still requires? The inclusion of *Pierson* with *Wood* and *Scheuer*, in combination with the failure to provide specifically for judicial immunity, leaves the Report's citation best understood as approving the already qualified status of executive immunity, not as expressing an intention to reduce the established scope of judicial immunity.*

The ambiguous House Report thus clearly is not enough in itself to express a Congressional intent to abrogate judicial immunity.

The overwhelming weight of the legislative history taken as a whole compels the conclusion that Congress simply did not intend to work such an abolition. Both Congressional reports, as well as the remarks on the Senate floor, repeatedly emphasize the continuation of past practice, consistency in the interpretation of fee provisions and, because of the immediate need to respond to *Alyeska*, a desire to avoid controversial new remedies. On balance, the conclusion is inescapable that Congress merely intended § 1988 to extend already well established fee shifting principles to

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* A review of the records of the House Committee also reveals no express intent to abrogate judicial immunity. *Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess., Oct. 6, 8, and Dec. 3, 1975.* Significantly, the author of the House Report, Congressman Drinan, makes no mention of abrogating judicial immunity in his statement to the Committee. *Id.* at 54.

those civil rights laws left bare by *Alyeska*, without in any way affecting the long-standing doctrine of judicial immunity from personal financial liability for judicial acts.

Both judicial independence and the appearance of judicial impartiality would be gravely endangered by withholding judicial immunity in suits under § 1988 or in other types of cases.

> "I am aware of the hidden tendency in the United States leading the people to diminish judicial power . . . I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrate's independence, not judicial powers only but the democratic republic itself has been attacked." Tocqueville, *Democracy in America* (Mayer and Lerner, Ed., 1966), at 246.

This Court should not countenance a step in that direction.

CONCLUSION

For the reasons outlined above, the Court should reverse the decision below.

Respectfully submitted,

MORRIS HARRELL,*
President, American Bar Association
W. ERVIN JAMES
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ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel of Record for the American Bar Association, who in this court is *Amicus Curiae.*

I certify that I am a member of the Bar of the Supreme Court of the United States.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PROOF OF SERVICE — CERTIFICATE BY BAR MEMBER

I, PHILLIP J. ROTH, one of the attorneys for the American Bar Association, *Amicus Curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9th day of June, 1983, I served copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* on the parties thereto, as follows:

1. On Counsel for the Petitioner, Gladys Pulliam, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to William G. Broaddus, Deputy Attorney General for the State of Virginia, at

his offices at 101 North Eighth Street, Richmond, Virginia 23219.

2. On Deborah C. Wyatt, Counsel for Respondents Richard R. Allen and Jesse W. Nicholson, by mailing three copies in a duly addressed envelope with air mail postage prepaid to offices of counsel at 917 East Jefferson Street, Charlottesville, Virginia 22901.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM,

Petitioner,

—v.—

RICHMOND R. ALLEN, ET AL.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF VIRGINIA, and NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Virginia is a state affiliate of the national ACLU.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit organization whose primary purpose is to provide effective legal services to persons unable to retain counsel. Its members include the great majority of legal services programs in the United States, public defender offices, and coordinated assigned-counsel programs. NLADA also includes 2000 individual members most of whom are private practitioners. NLADA has an overriding interest in protecting the rights of indigent clients and in insuring that they

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

are not denied their rights because of their lack of financial resources.

The underlying facts of this case involve the systematic pre-trial incarceration of indigent defendants charged with non-incarcerable petty offenses who were jailed solely because of their inability to post substantial cash bail. Because of the unconstitutionality of this systematic incarceration, an injunction was entered against petitioner on June 4, 1981. Flowing from that unappealed judgment on the merits, attorneys fees were awarded against petitioner in a separate order entered on July 6, 1981.

Amici ACLU, ACLU of Virginia, and NLADA agree with the decisions of the lower federal courts holding that fees were authorized and properly awarded against petitioner. Amici accordingly submit this brief in support of respondents.

SUMMARY OF ARGUMENT

1. Since petitioner never appealed from the trial court's judgment on the merits awarding prospective injunctive relief against her, and since petitioner in her certiorari petition accordingly could not have raised and did not raise any issue concerning the propriety of the injunctive relief, there is no issue before this Court concerning petitioner's alleged judicial immunity from prospective injunctive relief. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Strunk v. United States, 412 U.S. 434 (1973). Instead, in view of petitioner's appeal not from the judgment on the merits but only and explicitly from the subsequent order determining the amount of attorneys fees, the only issue before this Court is the sole question presented in the certiorari petition: "Whether Judicial Immunity Bars the Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988 Against a Member of the Judiciary Acting in His Judicial Capacity."

2. The award of attorneys fees incident to the unappealed grant of prospective relief against petitioner is not barred by judicial immunity.

a. First, the judicial immunity which precludes retrospective damages does not preclude fee awards since fees are not damages but instead are "expenses incurred in litigation." Hutto v. Finney, 437 U.S. 678, 695 (1978). As this Court concluded in Hutto, in holding that fee awards incident to prospective relief were not affected by Eleventh Amendment immunity from retrospective damages: "Unlike ordinary 'retroactive relief' such as damages or restitution, an award of [fees as part of the] costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." 437 U.S. at 695 n.24. Similarly, the incidental attorneys

fees awarded against petitioner here merely allocated the necessary expenses that flow from the grant of prospective relief since fees do not constitute retrospective relief.

b. Second, whatever the scope of judicial immunity, existing immunities may be overriden by Congress -- certainly in the context of authorizing attorneys fees "incurred in litigation seeking only prospective relief" -- without express statutory language abrogating those immunities. Hutto, 437 U.S. at 695, 696, 698. Here, Congress broadly provided that fees ordinarily are to be awarded against all losing defendants in "any action or proceeding." 42 U.S.C. § 1988. In fact, § 1988 "could not be broader. It applies to 'any' action to enforce certain civil rights laws. It contains no hint of an exception [for certain defendants.] Hutto, 437 U.S. at 694. Lest there be any doubt about its intent, Congress expressly recognized that the existence of common law immunities

protecting defendants from damages increased the importance of fee awards against those defendants found liable for prospective injunctive relief. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976), cited with approval in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 738-39 (1980). Empowered to abrogate any immunity from fees, Congress did so here.

3. Although there is no immunity issue presented in this case concerning petitioner's alleged judicial immunity from prospective relief, there in any event should be no doubt about the correctness of the existing consensus among the federal courts of appeals that judicial immunity does not preclude prospective injunctive relief on the merits against judicial officers. In three of the five categories of immunity -- sovereign, Eleventh Amendment, and executive -- this Court has explicitly drawn a distinction between prospective injunc-

tive relief necessary to enforce constitutional rights, which is permitted, and retrospective damage awards, which are barred. Since the rationale for this critical distinction fully applies to judicial immunity, and since the reasons for blanket legislative immunity are inapposite to judicial immunity, this Court has never accorded judges a blanket immunity from constitutional guidance. Legislative immunity, rooted in the separation of powers, has no applicability to an intra-branch immunity fashioned to promote constitutional responsibilities. Additionally, since judges, unlike legislators, are empowered to issue binding directives with attendant formalities -- e.g., unconstitutional decisions to jail respondents too poor to post bail for non-incarcerable petty offenses -- this implementation function forecloses the establishment of constitutional unaccountability through a blanket immunity. Decisions to implement, and implementation of an unconstitutional act, have never been accorded a blanket immunity.

ARGUMENT

This case involves the relatively rare situation in which a federal court, acting pursuant to 42 U.S.C. § 1983, may issue prospective relief against a pattern or practice of state judicial activity violative of federal constitutional rights. While, ordinarily, doctrines of comity[1] and standing[2] pose formidable obstacles to such relief, this Court has ruled that prospective federal judicial relief is available in a narrow class of constitutional cases which might otherwise escape effective redress. Gerstein v. Pugh, 420 U.S. 103 (1975); Mitchum v. Foster, 407 U.S. 225 (1972). See generally, Lynch v. Household Finance Co., 405 U.S. 538 (1972).

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1. See, Younger v. Harris, 401 U.S. 37 (1971). No state proceedings were pending against respondents on the date each commenced their proceeding.

2. See, O'Shea v. Littleton, 414 U.S. 488 (1974). Respondent Nicholson had been subjected to the challenged procedure on four occasions prior to intervening in this action. Compare, Kolender v. Lawson, ___ U.S. ___, 75 L. Ed.2d 903 (1983).

This case, involving the systematic pre-trial incarceration of indigent defendants too poor to post substantial cash bail in connection with petty offenses which, under Virginia law, are non-incarcerable, is a textbook example of the limited circumstances under which prospective relief against state judicial misconduct is appropriate.[3/] In fact, Magistrate Pulliam, the petitioner herein, neither appealed from, nor sought certiorari as to, the district court's grant of relief on the merits. Accordingly, applying settled rules of Supreme Court jurisdiction, the validity of the district court's decision to grant

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3. Respondent Allen was arrested for using abusive language in violation of § 18.2-416, a class 3 misdemeanor punishable by a fine of not more than $500. Cash bail was set at $250. Although the offense is non-incarcerable under Virginia law, he served 14 days in prison prior to trial. Respondent Nicholson was arrested four times for public drunkenness, a class 4 misdemeanor punishable by a fine of not more than $100. § 18.2-388. Although his offenses were non-incarcerable, he served from 2 to 6 days in prison, in connection with each arrest. Neither respondent was informed of a right to counsel, nor was counsel appointed for them. Magistrate Pulliam's actions were not isolated. Thirty-four similar incidents occured during the five month period surrounding the filing of this action.

prospective relief against Magistrate Pulliam may not be questioned in this proceeding. See generally, Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Cousins v. Wigoda, 419 U.S. 477 (1975). See also, Strunk v. United States, 412 U.S. 434 (1973). The sole issue properly before the Court is whether, in light of the existence of an unchallenged grant of prospective relief, an award of attorneys fees against Magistrate Pulliam in her official capacity was authorized by 42 U.S.C. § 1988. Since, at a minimum, Congress intended 42 U.S.C. § 1988 attorneys fees to flow from grant of relief on the merits under 42 U.S.C. § 1983, the existence of an unchallenged prospective decree against Magistrate Pulliam provides an ample predicate for the award of reasonable attorneys fees which, in any event, have already been paid by the Commonwealth of Virginia. See, Hutto v. Finney, 437 U.S. 678 (1978).

I. THE EXISTENCE OF A VALID INJUNCTION ON THE MERITS AGAINST MAGISTRATE PULLIAM IN HER OFFICIAL CAPACITY IS NOT SUBJECT TO QUESTION IN THIS PROCEEDING BECAUSE IT WAS NOT APPEALED TO THE FOURTH CIRCUIT NOR RAISED IN PETITIONER'S APPLICATION FOR CERTIORARI

The district court granted injunctive relief on the merits against Magistrate Pulliam on June 4, 1981 and awarded reasonable attorneys fees under 42 U.S.C. § 1988 to plaintiffs' counsel, with the precise amount to be determined. (JA at 22).[4/] The entry of a final injunction and fee award is an appealable final order, nowithstanding the unresolved question of the precise amount of the fees. See generally, White v. New Hampshire Dep't of Employment Security, 455 U.S. 445 (1982); Boeing v. Van Gemert, 444 U.S. 472 (1980).[5/] Magistrate

4. JA citations are to the Joint Appendix of the parties.

5. This Court's decision in White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 451-52 (1982), recognized that "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action," that a "court's decision of

[footnote 5 continued on the following page]

Pulliam did not file a notice of appeal from the district court's June 4 order. On July 6, 1981, the district court issued a second, separate order which dealt only with the precise amount of the fee award. (JA at 38). Magistrate Pulliam filed a notice of appeal from the July 6th order on July 27, 1981.

[footnote 5 continued from previous page]

entitlement to fees will therefore require an inquiry separate from the decision on the merits", and that accordingly a fee "award is uniquely separable from the cause of action to be proved at trial." Prior to that decision, the courts of appeals were divided on whether separate notices of appeal had to be filed from the final judgment on the merits and from the award. See generally the cases cited in White, 455 at 452-53 n.14; see also, Terket v. Lund, 623 F.2d 29 (7th Cir. 1980). As a result of White, the courts of appeals have widely viewed judgments on the merits and fee awards as involving separate appeals. See Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 644 (3d Cir. 1982) (rehearing en banc), holding that the Third Circuit's earlier decision on this point in Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (en banc), had been effectively overruled by White, supra; see also, NAACP v. Evergreen, 693 F.2d 1367 (11th Cir. 1982); Culinary and Service Employee Union v. Hawaii Employee Benefit Admin., 688 F.2d 1228 (9th Cir. 1982). This Court's approach in White was consistent with its recognition in Boeing Co. v. Van Gemert, supra, that the merits and the question of fees raise separate issues for appeals purposes.

(JA at 5). However, no appeal from the June 4th order was ever attempted.[6/] Thus, Magistrate Pulliam never attempted to appeal on the issue of her immunity from prospective injunctive relief.

Similarly, the petition for certiorari filed on Magistrate Pulliam's behalf by the Attorney General of Virginia carefully avoids seeking review of the propriety of the prospective relief issued by the district court, confining itself to the question of whether attorneys fees may be awarded incident to a concededly valid grant of prospective relief

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6. It is possible, of course, for a litigant in 1981 to have harbored a degree of uncertainty as to whether a separate notice of appeal was necessary from the June 4th order, or whether the continued dispute over the precise amount of the fees acted to extend the time to appeal. See, Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976). However, an examination of Magistrate Pulliam's notice of appeal and brief in the Fourth Circuit makes it clear that she was seeking to appeal only from the fee award contained in the July 6th order and not from the June 4th order on the merits. Thus, even if one assumes arguendo that a dispute over the size of a fee award extends the time to appeal on the merits (a highly doubtful assumption after White v. New Hampshire Dep't of Employment Security), it is clear that Magistrate Pulliam never attempted such an appeal.

against a judge.[7]

The Court has held that the failure to appeal on the merits precludes an attempt to re-argue the merits under the guise of a dispute over fees. In Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), for example, a district court granted a three million dollar compensatory damage award and approved a "common fund" fee provision which permitted counsel to collect fees from the unclaimed portion of the damage fund. Boeing, claiming that the fee provisions created a de facto fluid class, appealed from the fee provisions, but never filed a notice of appeal on the merits. When Boeing sought to attack the compensatory award in the Supreme Court, Justice Powell, writing for the Court, noted:

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7. The sole question presented in the petition for certiorari was:

> **Whether Judicial Immunity Bars the Award of Attorneys Fees Pursuant to 42 U.S.C. § 1988 Against a Member of the Judiciary Acting in His Judicial Capacity?**

> . . . the judgment awarding the class a fixed recovery was final and appealable. Since Boeing did not appeal it, we cannot now consider whether the judgment was in error.

444 U.S. at 479 n.5.

Similarly, this Court has consistently refused to entertain issues which are not fairly encompassed in the certiorari petition. For example, in Strunk v. United States, 412 U.S. 434 (1973), this Court declined to permit the United States to question whether petitioner had, in fact, been denied a speedy trial because the only issue raised in the petition was the remedy for denial of a speedy trial.

Therefore, since Magistrate Pulliam both failed to appeal on the merits and failed to raise the issue in her certiorari petition, it must be assumed that the district court was empowered to enter prospective relief on the merits against her. In any event, the propriety of the prospective relief is not properly before this Court.

II. THE DISTRICT COURT WAS EMPOWERED TO AWARD ATTORNEYS FEES INCIDENT TO THE GRANT OF PROSPECTIVE RELIEF

The manifest purpose of 42 U.S.C. § 1988 was to encourage the enforcement of rights protected by 42 U.S.C. § 1983 by authorizing an award of attorneys fees to prevailing plaintiffs in § 1983 cases. Given the failure of petitioner to have even sought review of the district court's relief on the merits, respondents are clearly a prevailing party within the meaning of the statute and, thus, fall within its literal terms.

Petitioner seeks to avoid the literal reach of the statute by arguing, first, that the district court lacked power to issue prospective relief against a judicial officer. Accordingly, petitioner argues, no valid judgment existed which established respondents as a "prevailing party." However, as respondents have demonstrated, petitioner's failure to have appealed or to have sought certiorari on the issue precludes a challenge in this

Court to the status of respondents as a "prevailing party." Alternatively, petitioner argues, even if respondents are viewed as a prevailing party within the meaning of § 1988, it was error to award attorneys fees against Magistrate Pulliam in light of this Court's recent re-affirmation of absolute judicial immunity from actions for retrospective damages in Stump v. Sparkman, 435 U.S. 349 (1978).

Petitioner's argument fails, however, on two levels. First, an award of fees and costs incident to the grant of prospective relief is fundamentally different from an award of retrospective damages penalizing a defendant for having engaged in unconstitutional activity and, thus, is not precluded by judicial immunity. Second, whatever the reach of common law judicial immunity, Congress, in the exercise of its uncontested power to alter common law immunities,

has authorized an award of fees and costs against any defendant -- including a judge -- against whom relief pursuant to 42 U.S.C. § 1983 has been granted on the merits.

A. This Court Has Recognized A Fundamental Distinction Between An Award of Attorneys Fees Incident to the Grant of Prospective Relief and the Grant of Retrospective Damages

In Hutto v. Finney, 437 U.S. 678 (1978), this Court was called upon to determine whether the Eleventh Amendment precluded an award of attorneys fees against a state entity which was absolutely immune from an award of retrospective damages under the doctrine of Edelman v. Jordan, 415 U.S. 651 (1974); see also, Ex parte Young, 209 U.S. 123 (1908). The Hutto Court, in response, initially recognized that fees are not damages but instead are "expenses incurred in litigation." 437 U.S. at 695. The Hutto Court in fact gave explicit recognition to this distinction: "Unlike ordi-

nary 'retroactive relief' such as damages or restitution, an award of [fees as part of the] costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." 437 U.S. at 695 n.24.[8/] Accordingly, noting that costs had been awarded against Eleventh Amendment defendants

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8. This distinction between fees and retroactive relief for past injury was unanimously reaffirmed in White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 452 (1982), where the Court confirmed that "the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action." Congressional intent behind the Fees Act is in accord: fees are not damages but are to be treated "like other items of costs." S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

Accordingly, and quite contrary to the argument advanced in the Brief of Petitioner at 18-21, and similarly advanced by petitioner's amici, dollars are not the equivalent of damages. This is even true with regard to prospective injunctive relief. See, e.g., Milliken v. Bradley, 433 U.S. 267, 288-91 (1977) (Michigan's liability for prospective injunctive relief costing $5.8 million is not barred by the State's immunity from damages).

against whom prospective relief had been granted since Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), this Court ruled in Hutto that an award of attorneys fees would not violate the Eleventh Amendment's ban on retrospective relief. Similarly, an award of attorneys fees against a judge sued in her official capacity would merely allocate the necessary expenses of socially desirable litigation, but would not constitute an award of retrospective relief within the meaning of Stump v. Sparkman, supra.

Nor would such an award implicate the policies underlying absolute judicial immunity from retrospective damage awards, especially where, as here, the fee award will be paid, not by the judge personally, but by the Commonwealth of Virginia. In Stump v. Sparkman, supra, this Court recognized that the principal goal of judicial immunity was to preserve the capacity for uninhibited decision-making by a judge free from the fear of financial liability

for a "wrong" decision. Where, however, a federal court issues prospective relief against a judge, an award of fees and costs incident to that relief does not interfere with legitimate judicial decision-making, since it is in no way responsive to a judge's past acts. Rather, it is simply a congressionally authorized mechanism for allocating the necessary expenses among the participants of an important dispute-resolution mechanism.

Moreover, as this Court noted in Hutto, an award of fees against a judge against whom prospective relief has been obtained solely in her judicial capacity will not be paid by the judge personally, but will be obtained instead "'from the State'" itself. 437 U.S. at 694. Since the award of fees herein was incident to prospective relief and since it has been paid by the Commonwealth of Virginia, it cannot exercise an unduly inhibiting effect on legitimate judicial decision-making and does not run afoul of the policies underlying judicial immunity from retrospective damage awards.

B. Congress Intended to Authorize an Award of Attorneys Fees as an Element of Costs Incident to All Relief Granted Pursuant to 42 U.S.C. § 1983 and, thus, Abrogated Any Pre-Existing Judicial Immunity From Fee Awards

Even if a fee award is viewed as impinging on common law judicial immunity, this Court has left no doubt that Congress is empowered to abrogate common law immunities. Pierson v. Ray, 386 U.S. 547, 554-55 (1967); cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

This Court has made it equally apparent that existing immunities may be overriden by Congress -- at least in the context of authorizing attorneys fees "incurred in litigation seeking only prospective relief" -- without express statutory language abrogating those immunities. Hutto v. Finney, 437 U.S. 678, 695 (1978).

In Hutto, the Court squarely rejected an argument similar to petitioner's contention here, not just in the context of an undefined common law immunity, but with regard to the

constitutional immunity enjoyed by the states under the Eleventh Amendment. Like the petitioner here, the Arkansas Attorney General argued in Hutto that "Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity." 437 U.S. at 694 (footnote omitted). This Court rejected that argument, noting that Congress may "amend its definition of taxable costs [to include attorneys fees] and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the State's Eleventh Amendment immunity." 437 U.S. at 696. The Court concluded, 437 U.S. at 698: "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity."

Congress, thus, was not required to state expressly that it intended to abrogate judicial immunity -- even assuming such immunity applied to litigation seeking only prospective relief -- when it authorized fees under the Fees Act without distinguishing among defendants. Congress broadly provided in the Fees Act that fees were available in "any action or proceeding." 42 U.S.C. § 1988. See generally, Maher v. Gagne, 448 U.S. 122 (1980). In fact, as the Court pointed out in Hutto, 437 U.S. at 694: "The Act itself could not be broader. It applies to 'any' action to enforce certain civil rights laws. It contains no hint of an exception [for certain defendants]."

Congress explicitly recognized in the House Report accompanying the Fees Act that the existence of common law immunities protecting certain defendants against damage awards increased the importance of fee awards against those defendants when plaintiffs won injunctive relief:

> [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or surely limit the damage remedy[17] [citing in the accompanying footnote Pierson v. Ray, 386 U.S. 547 (1967)]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases . . . only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976).[9] See also Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 738-39 (1980)

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9. Petitioner's attempt to discount the weight which should be given by this Court to the language in the House Report, see Brief of Petitioner at 23, is disingenuous at best in view of this Court's repeated reliance solely on the House Report to resolve fee issues. See, e.g., Maher v. Gagne, 448 U.S. 122, 128 n.10, 132 n.15 (1980) (a plaintiff who asserts a substantial constitutional claim but who prevails on a pendent claim is entitled to fees, citing the House Report at 4 n.7); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71, n.9 (1980) (plaintiff's free representation by a public interest group is no reason for denying fees, citing the House Report at 5 & 8 n.16); Hutto v. Finney, 437 U.S. 678, 694, n.23 (1978) (the Fees Act applies to all cases pending on the date of enactment, citing the House Report at 4 n.6).

("The House Committee Report on the [Fees] Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards," citing the House Report at 9).[10/]

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10. Based on the language of the Fees Act and on its legislative history, and based on this Court's decision in Hutto, the three courts of appeals which have reviewed the issue here have ruled that Congress intended to authorize fee awards against judges in appropriate cases. Allen v. Burke, 690 F.2d 376 (4th Cir. 1982); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981); cf., Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981). In Morrison, county judges were sending convicted indigents to jail for summary or petty offenses without first affording a right to counsel. 627 F.2d at 670. Based on the legislative history, the Third Circuit concluded that "Congress expressly considered judicial immunity and decided to abrogate it under § 1988." Id. at 672. Although Entertainment Concepts involved the immunity of village officials, the Seventh Circuit in reaching its decision specifically expressed its agreement with the Morrison decision. 631 F.2d at 507. See also, Pomerants v. Los Angeles, 674 F.2d 1288, 1293 (9th Cir. 1982) (the Ninth Circuit concluded that defendant county officials were protected by quasi-judicial immunity, yet would be subject to attorneys fees awards if plaintiffs were properly considered "prevailing parties"); R.W.T. v. Dalton, 540 F. Supp. 772, 773 (E.D. Mo. 1982) (in awarding fees against state circuit judges, the court expressly adopted "the reasoning and the holding in Morrison").

Congress also recognized when it enacted the Fees Act that fee awards would not deter state officials -- whether judicial officers or executive officers -- from performing their duties since fee awards against officials sued in their official capacities would properly be obtained "'from the State'" itself "'whether or not the agency or government is a named party.'" Hutto, 437 U.S. at 694, 700, quoting from S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). In fact, the Court in Hutto viewed such a result as particularly appropriate in a case such as this where the Attorney General "has defended this action since it began." 437 U.S. at 699.

Accordingly, in view of Congress' unquestioned power and in view of Congress' express authorization of fees as a part of the costs without distinction among defendants, fees were properly awarded against petitioner here as incidental to the unappealed injunctive relief.

III. JUDICIAL IMMUNITY DOES NOT EXTEND TO ACTIONS FOR PROSPECTIVE RELIEF AGAINST A PATTERN OR PRACTICE OF UNCONSTITUTIONAL CONDUCT

Petitioner's failure to have appealed or to have sought certiorari on the issue precludes consideration of the propriety of the district court's grant of prospective relief on the merits. See supra at 11-15. If, however, the Court chooses to consider the question, the existing consensus in the lower federal courts that judicial immunity does not preclude prospective relief is clearly correct.[11/]

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11. At least eight circuits have explicitly ruled that judicial immunity does not bar prospective relief. FIRST CIRCUIT: In re Supreme Court of Puerto Rico, 695 F.2d 17, 26 (1st Cir. 1982); SECOND CIRCUIT: Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979) (per curiam); Person v. Ass'n of the Bar of New York, 554 F.2d 534, 537 (2d Cir. 1977), cert. denied, 434 U.S. 924 (1977); THIRD CIRCUIT: Morrison v. Ayoob, 627 F.2d 669, 672-73 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981); FOURTH CIRCUIT: Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973), reaffirmed in Allen v. Burke, 690 F.2d 376 (4th Cir. 1982); FIFTH CIRCUIT: Slavin v. Curry, 574 F.2d 1256, 1264 (5th Cir. 1978), vacated as moot, 583 F.2d 779 (5th Cir. 1978); SEVENTH CIRCUIT: Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981); Harris v. Harvey, 605 F.2d 330, 335 n.7 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); EIGHTH CIRCUIT:

[footnote 11 continued on the following page]

This Court has recognized five categories of immunity: sovereign, Eleventh Amendment, judicial, executive, and legislative. In three categories -- sovereign, Eleventh Amendment and executive -- the Court has explicitly drawn a critical distinction between retrospective damage awards, which are precluded, and prospective awards necessary to enforce constitutional rights, which are not.

Since United States v. Lee, 106 U.S. 196 (1882), it has been clear that while sovereign immunity bars actions for damages against the United States, the doctrine does not bar prospective relief designed to assure compliance

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[footnote continued from previous page]

Kelsey v. Fitzgerald, 574 F.2d 443 (8th Cir. 1978); NINTH CIRCUIT: Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978). Three circuits have indicated agreement with the proposition. SIXTH CIRCUIT: WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981); TENTH CIRCUIT: Henrikson v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); DISTRICT OF COLUMBIA CIRCUIT: Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977).

This Court, in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), noted that prospective relief against judicial officials had been granted on several occasions, but declined to rule explicitly on the issue. 446 U.S. at 735 nn.13 and 14.

with constitutional principles. See also, Land v. Dollar, 330 U.S. 731 (1947). Similarly, in Ex parte Young, 209 U.S. 123 (1908), and Edelman v. Jordan, 415 U.S. 651 (1974), this Court ruled that the Eleventh Amendment insulated states from retrospective damage awards in federal court, but did not preclude the issuance of prospective relief in constitutional cases. Most recently, this Court granted the President absolute immunity from damage actions arising out of his conduct in office, while consistently recognizing the authority of the judiciary to issue prospective relief against the President and his close associates. Compare, Nixon v. Fitzgerald, ___ U.S. ____, 73 L.Ed.2d 349 (1982), with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and United States v. Nixon, 418 U.S. 683 (1974). In addition, in recognizing a species of "quasi judicial" immunity for executive officials performing tasks closely related to the adjudicative function, this

Court has clothed prosecutors, administrative hearing officers and police witnesses with absolute immunity from damage actions, while carefully preserving prospective relief when necessary to protect constitutional rights. See respectively, Imbler v. Pachtman, 424 U.S. 409 (1975); Butz v. Economou, 438 U.S. 478 (1978); and Briscoe v. Lahue, ___ U.S. ____, 75 L.Ed.2d 96 (1983). Indeed, in Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975), this Court explicitly noted that "immunity from damages does not ordinarily bar equitable relief as well."

Petitioner argues that, notwithstanding the settled distinction between retrospective and prospective relief in the context of immunity doctrine, judges should be afforded absolute immunity from prospective as well as retrospective relief because legislators enjoy a similar blanket immunity. However, legislative immunity provides no support for an exemption of judges from all judicial accountability.

First, legislative immunity is rooted in separation of powers doctrine which prevents the executive and judicial branches from interfering in the internal affairs of the legislature.[12] Historically, it emerged from the fear that the King's judges would interfere with the ability of Parliament to function.[13]

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12. The development of legislative immunity under the Speech or Debate Clause may be traced through Kilbourne v. Thompson, 103 U.S. 168 (1880); United States v. Johnson, 383 U.S. 169 (1966); Dombrowski v. Eastland, 387 U.S. 82 (1967); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), and United States v. Helstoski, 442 U.S. 477 (1979). State legislative immunity is discussed in Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Gillock, 445 U.S. 360 (1980); and Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

13. As Justice Harlan noted in United States v. Johnson, 383 U.S. 169, 182 (1966):

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and is . . . the predominate thrust of the Speech or Debate Clause.

Given its separation of power rationale, protection against injunctive relief is an integral and necessary aspect of legislative protection against judicial interference. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

Judicial immunity, on the other hand, is an intra-branch immunity fashioned to advance a functional end. Its principal aim is to assure that judges not be inhibited in the performance of their adjudicatory responsibilities by a fear of potential liability for a "wrong" decision. Stump v. Sparkman, 435 U.S. 349 (1978). Thus, when a judge functions in an administrative capacity, he or she may not claim judicial immunity because potential liability for administrative acts does not inhibit the adjudicatory function. Supreme Court of Virginia v. Consumers Union, supra. Similarly, when a judge receives prospective judicial guidance concerning constitutional responsibilities, no legitimate aspect of the

adjudication function is threatened. State judges are shielded from undue federal judicial interference, not by judicial immunity, but by doctrines of federalism and justiciability. Where those doctrines are satisfied -- as they were in this case -- no principled basis exists for treating the intra-branch doctrine of judicial immunity as though it were rooted in separation of powers.

Second, even legislative immunity, broad though it may be, is not boundless. When the legislature's handiwork actually impacts upon an individual, basic principles of judicial review authorize the judiciary to enjoin its implementation. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Ordinarily, of course, legislators are not permitted to play a role in the enforcement of their handiwork. Buckley v. Valeo, 424 U.S. 1 (1976). Thus, relief against the legislature is, generally, not required to prevent the implementation of

an unconstitutional act.[14/] In fact, in those rare situations where legislative bodies are permitted to assume executive functions as well, this Court has explicitly authorized injunctive relief against the legislators in their executive capacities. Supreme Court of Virginia v. Consumers Union, supra.

Judges, unlike legislators, are directly involved in the implementation of their decisions, both through the formulation of binding directives and the execution of necessary formalities. See generally, Walker v. Birmingham, 388 U.S. 307 (1967). Thus, in carrying out her unconstitutional decisions to jail respondents because they were too poor to post

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14. Even Eastland v. United States Servicemen's Fund, supra, did not involve the abolition of judicial review, merely its postponement. In Eastland, this Court ruled that arguably unconstitutional legislative subpoenas could not be enjoined. Instead, a witness, in order to invoke judicial scrutiny, was obliged to ignore the subpoenas and raise their unconstitutionality as a defense to a criminal prosecution for contempt of Congress. This Court has held that an arguably unconstitutional injunction may not be similarly ignored. Walker v. Birmingham, 388 U.S. 307 (1967).

substantial cash bail for non-incarcerable petty offenses, Magistrate Pulliam issued specific orders to court personnel and executed commitment papers which could be ignored only on pain of contempt. Walker v. Birmingham, supra. Whether one views such implementing activity as a species of administrative activity, as in Supreme Court of Virginia v. Consumers Union, or as the implementation phase of her judicial function. prospective relief against Magistrate Pulliam was proper to prevent the implementation of her unconstitutional decisions, just as relief against the Supreme Court of Virginia was proper to prevent the implementation of its unconstitutional legislative activity. Thus, even if judicial immunity is viewed as co-terminous with legislative immunity, both recognize that prospective relief aimed at preventing the implementation of an unconstitutional act is not precluded.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Dated: July 25, 1983

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No. 82-1432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

v.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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No. 82-1432

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v.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Conference of Chief Justices is an independent organization comprised of the presiding judicial officers of the highest court of each state, the District of Columbia, Puerto Rico and each U. S. territory. It files this brief with the consent of all parties[1] and urges reversal of the decision of the court of appeals.

[1] Counsel for Petitioner Pulliam, the Attorney General of the Commonwealth of Virginia, has expressed Petitioner's consent by letter dated May 27, 1983. Counsel for Respondents Allen and Nicholson has expressed Respondents' consent by letter dated May 31, 1983. Both letters have been filed with the Clerk of the Court.

The Conference of Chief Justices was formed more than thirty years ago and since that time has been concerned with the administration of justice, improvements in the state court systems, and the proper relationship between the state and federal courts. The Conference fully supports maintenance of federal court jurisdiction in all appropriate cases, as evidenced by its recent unanimously passed resolution opposing legislation to restrict the jurisdiction of the federal courts. The Conference, however, has also consistently taken the position that federal lower court review of decisions of state courts contradicts important principles of federalism and jeopardizes the integrity of the state court structure.

The Court in this case may decide whether state court judges are absolutely immune from suit in non-damages actions and whether costs and attorneys' fees may be awarded against state judges. The Court's decision therefore potentially will have a profound impact on the functioning of the state court systems and on the independence of state judges. The decision may also have a substantial impact on the delicate relations between the federal and state judiciaries. The Conference of Chief Justices has a direct interest in advocating the views of its members on these matters because of their importance to the operation of the state court systems and to the independence of state judges.

SUMMARY OF ARGUMENT

The question in this case is whether the settled doctrine of absolute judicial immunity from liability for damages applies as well to insulate judges from actions for declaratory or injunctive relief. If not, the remaining question is whether the award of attorneys' fees and costs is so similar to an award of damages that it is barred in suits against judges by the doctrine of absolute judicial immunity.

1. Historically few doctrines were more solidly established at common law than the absolute immunity of judges from liability for damages. *Pierson* v. *Ray*, 386 U.S. 547, 553-55 (1967); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872). That established common law doctrine survived the enactment of

Section 1 of the Civil Rights Act of 1871 (now codified as 42 U.S.C. § 1983 (1976 & Supp. V 1981)). *Pierson* v. *Ray*, 386 U.S. at 554. The reasons for absolute judicial immunity were and are the public interest in an independent judiciary and the concern that there be no chill on independent judicial decision-making caused by the threat of lawsuits. *Butz* v. *Economou*, 438 U.S. 478, 512 (1978); *Stump* v. *Sparkman*, 435 U.S. 349, 355-59 (1978); *Pierson* v. *Ray*, 386 U.S. at 554. The policy reasons underlying absolute judicial immunity apply with equal force whether the suit is for injunctive or declaratory relief or for money damages.

2. The Court has held that where state or federal legislators raise absolute immunity as a defense to an action, it will be recognized whether the action is for money damages or for injunctive or declaratory relief. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 733-34 (1980); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). The purpose of legislative immunity is to preserve legislative independence, to protect the integrity of the legislative process, and to prevent distraction of legislators' attention from their public responsibilities. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 502-03. The rationale for absolute immunity for judges is precisely the same. Accordingly, the rule with respect to judicial immunity ought to be the same as the rule for legislative immunity.

3. The nature of the judicial process itself, the safeguards built into it and the many alternative remedies available to the public to deter judicial wrongdoing make civil suits unnecessary and justify the recognition of absolute judicial immunity from all suits. *See Butz* v. *Economou*, 438 U.S. at 512. Appellate review, mandamus, state and federal habeas corpus, judicial disciplinary panels, impeachment and criminal sanctions are among the available alternatives. Under our system of federalism, the failure to pursue these established alternatives counsels against permitting suits to be brought against state judges in federal court and is yet another reason to recognize the doctrine of absolute judicial immunity. *See, e.g., Allen* v.

McCurry, 449 U.S. 90, 104-05 (1980); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 603, 608-09 (1975).

4. The threat of the grant of attorneys' fees and costs has the same kind of chilling effect on judicial independence as does a suit against a judge for money damages. The possibility that the state or local government may ultimately pay the fee award pursuant to an indemnification statute does not lessen the coercive effect. Most indemnification statutes are subject to numerous exclusions and many require a showing of good faith conduct, the very showing required for qualified immunity which has never been thought sufficient protection for judges.

5. Congress did not intend to abolish absolute judicial immunity and thereby subject judges to awards of attorneys' fees and costs when it enacted the Civil Rights Attorney's Fees Awards Act of 1976. The excerpt from the House Report relied on by the court of appeals necessarily referred to qualified immunity and other special defenses for executive branch officials, not absolute immunity. Moreover, since the House of Representatives debated and voted on the Senate bill, and not the House bill, reliance on the House Report is somewhat questionable. Finally, the legislative history of section 1988 makes clear that the bill was not intended to create any new legal remedies or expand or overturn prior law or practice except this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1976).

ARGUMENT

I. The Doctrine Of Judicial Immunity Bars Suits For Injunctive Or Declaratory Relief.

This case presents the question left unresolved by the Court in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980): whether the long established doctrine of absolute judicial immunity from liability for damages applies as well to insulate judges from declaratory or injunctive relief with respect to their judicial acts. *Id.* at 735-36.

Applying a functional analysis, this Court has recognized absolute immunity for state and federal legislators in the performance of their legislative functions, for judges in their judicial functions, for prosecutors and similar officials when performing strictly prosecutorial functions, for certain executive branch officers engaged in adjudicative functions, for witnesses in judicial proceedings, and for the President of the United States. *See, e.g., Briscoe* v. *Lahue*, 103 S. Ct. 1108, 1115-16 (1983); *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727, 2732-33 (1982), and cases cited therein. All other state and federal officials may defend on the basis of a qualified immunity for conduct undertaken reasonably and in good faith, but they are not absolutely immune. *Harlow* v. *Fitzgerald*, 102 S. Ct. at 2733; *Butz* v. *Economou*, 438 U.S. 478, 506-07 (1978).

Absolute immunity, when it applies, may be invoked and will be recognized whether the suit is instituted against federal officials pursuant to statutory or common law principles or under a *Bivens* theory,[2] or whether the suit is instituted against state officials pursuant to 42 U.S.C. § 1983 (1976 & Supp. V 1981), which is the basis for asserted federal jurisdiction in this case.[3] In the case of legislators, the Court has concluded that the policies underlying the recognition of absolute immunity from damages actions apply equally in suits for injunctive or declaratory relief. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 731-34; *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975). Moreover, since such immunity insulates a state legislator from suit under section 1983, the Court has reasoned that Congress did not intend to permit the award of attorneys' fees under section 1988. *Supreme Court of Virginia* v. *Consumers Union*, 446

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[2] *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[3] It would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U.S. at 504; *see Harlow* v. *Fitzgerald*, 102 S. Ct. at 2738 n.30.

U.S. at 737-39. The analysis underlying the prior decisions of this Court requires similar conclusions with respect to state judges and magistrates when performing their judicial functions.[4]

A. The important policy reasons underlying absolute judicial immunity in actions for money damages apply with equal force in actions for injunctive or declaratory relief.

Historically the doctrine of absolute judicial immunity was understood to bar suits for injunctive or declaratory relief as well as suits for money damages. Most early opinions discussing immunity for judges enunciated the doctrine in sweeping language, not limiting the immunity's application to particular types of civil suits.[5] Although few common law cases specifically addressed the issue of judicial immunity from suits for injunctive or declaratory relief and the decisions of this Court have arisen only in the context of actions for money damages, it

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[4] There is no question in this case that Petitioner was performing her judicial functions. Va. Code §§ 19.2-20, 19.2-45(3), 19.2-123 (Supp. 1982) (magistrate has power to issue arrest warrants and set bail). Nor is there any question that under Virginia law Magistrate Pulliam is a judicial officer. Va. Code § 19.2-119 (1975) (as "used in this article, the term 'judicial officer' means, unless otherwise indicated, any magistrate within his jurisdiction"); *see Bellamy* v. *Gates*, 214 Va. 314, 200 S.E.2d 533 (1973) (magistrates, as judicial officers, are immune from liability in suits for money damages); *Berry* v. *Smith*, 148 Va. 424, 139 S.E. 252 (1927) (same).

[5] *See, e.g., Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) (the "principle, therefore, which exempts judges . . . from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence"); *Randall* v. *Brigham*, 74 U.S. (7 Wall.) 523, 535 (1868) ("it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction"); *Ross* v. *Rittenhouse*, 2 Dall. 160, 164 (Pa. 1792) (McKean, C.J.) ("an action will not lie against a judge for what he does as such").

appears that absolute judicial immunity from all types of civil suits was established at common law.

This Court first enunciated the policy reasons for recognizing absolute judicial immunity in 1872. In *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), the Court reasoned that preservation of judicial independence mandates absolute immunity from suit in civil damages actions because judicial freedom to decide is critical to the proper administration of justice. *Id.* at 347. "Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful." *Id.* If civil actions could be maintained against judges, "because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away." *Id.* at 348. Thus the policy behind the doctrine at common law was that absolute judicial immunity was essential to protect the public interest in an independent judiciary. This public interest is equally important whether the suit is for injunctive or declaratory relief or for money damages.

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court held that the common law doctrine of absolute judicial immunity recognized in *Bradley* was applicable in suits brought under Section 1 of the Civil Rights Act of 1871[5] because there was no indication that Congress had intended to abolish that "settled principle of law." *Id.* at 554. The Court stated:

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases

[5] Ch. 22, 17 Stat. 13 (1871) (now codified as 42 U.S.C. § 1983).

> that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. *Ray*, 386 U.S. at 554 (citations omitted); *accord Butz* v. *Economou*, 438 U.S. at 512; *Stump* v. *Sparkman*, 435 U.S. 349, 355-57 (1978). Thus, as the Court has more recently noted, "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Stump* v. *Sparkman*, 435 U.S. at 359.

At the heart of the doctrine of absolute judicial immunity is the concern that there be no chilling effect on independent judical decision-making caused by the threat of lawsuits. But the chill arises regardless of the type of relief sought in the suit. The chill occurs not merely because the judge might suffer pecuniary loss, but more importantly because the threat of a lawsuit intimidates fearless decision-making and may force the judge to select the least risky solution to the case rather than the best solution. In short, it raises "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976).[7] Indeed, the threat of suit "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950). That principle

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[7] In criminal cases, for example, the threat of suit emanates from only one party, the defendant, because the state has no constitutional rights to vindicate. Thus, the judge is pressured only by the threat that the defendant will bring a suit for a violation of his constitutional rights. It is not unreasonable to expect a risk-averse judge in such a case to be influenced to resolve close cases (or, worse, even those not so close) in favor of the defendant. *See* Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 332 (1969).

applies and should be recognized regardless of whether the suit is one for damages or one for declaratory or injunctive relief.[8]

Aside from the chilling effect on judicial independence, there are numerous other costs to society that would result if judges could be sued for injunctive or declaratory relief. The threat of lawsuits would divert judicial energy from criticial issues to the creation of elaborate record-keeping systems designed to protect the state judge by preserving every detail of his decision-making process for later review by a federal judge. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) at 349. If a suit is actually filed, even more precious judicial time would be consumed in defending the suit, preparing litigation documents and motions, attending depositions and responding to interrogatories. The net effect would be to exacerbate the already critical shortage of judicial resources in the state courts. Moreover, the likelihood of being hounded by dissatisfied litigants would deter able lawyers from accepting judicial office. *Cf. Harlow* v. *Fitzgerald*, 102 S. Ct. at 2736. It is no answer to argue that competent judges need not fear suits if their decisions are legally correct. Disappointed litigants may always allege judicial bias or malicious action even if the claim is unfounded or wholly frivolous; without absolute immunity, the judge would be compelled to defend himself. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) at 348.[9]

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[8] A suit requesting injunctive or declaratory relief against a judge is "of the same order of magnitude" as a suit for money damages. *Cf. Dennis* v. *Sparks*, 449 U.S. 24, 31 (1980). In contrast to the judge's role as a witness in *Dennis* v. *Sparks*, the judge's role in a suit for injunctive or declaratory relief is identical to his role in a suit for money damages because in both cases the judge must be concerned at the time he makes a decision with the possibility of having to defend himself in collateral proceedings and being held liable.

[9] Although it is sometimes true that summary judgment will eliminate these claims before trial, the state judge is nonetheless forced to prepare a thorough defense because he cannot predict whether the federal judge presiding over his case will recognize that the claim is frivolous. In addition, the plaintiff will usually be afforded an oppor-

B. The reasons for the Court's recognition of absolute legislative immunity in suits for injunctive or declaratory relief compel the same result when such actions are brought against judges.

Not only do the policies behind absolute judicial immunity demonstrate that the doctrine should apply in suits for injunctive or declaratory relief, but the legislative history of section 1983 also supports recognition of the doctrine in such suits. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), the Court held that Congress had not intended to abolish legislative immunity in enacting section 1983. *Id.* at 376. Similarly, in *Pierson* v. *Ray*, 386 U.S. at 554-55, after a careful examination of the legislative history, the Court concluded that Congress had not abolished judicial immunity when it enacted section 1983. It stated: "[W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 555.[10] Therefore, just as the Court later concluded in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 733-34, that the same policy reasons for recognizing absolute legislative immunity in damages actions under section 1983 required the recognition of absolute legislative immunity in suits requesting

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tunity to conduct discovery to determine whether there are disputed issues of material fact that would preclude summary judgment. More important, "questions of subjective intent . . . rarely can be decided by summary judgment." *Harlow* v. *Fitzgerald*, 102 S. Ct. at 2738.

[10] The Court relied on the standard maxim of statutory interpretation that a statute should not be interpreted in derogation of the common law without strong evidence that the legislature intended that effect. *Pierson* v. *Ray*, 386 U.S. at 554-55; *see* Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 325 (1969). Moreover, as the Court has noted, the members of the Congress that passed the Civil Rights Act of 1871 were familiar with the common law defenses previously recognized and intended them to apply absent specific provisions to the contrary. *See Briscoe* v. *Lahue*, 103 S. Ct. at 1113; *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *see also Smith* v. *Wade*, 51 U.S.L.W. 4407, 4417 & n. 6 (U.S. Apr. 20, 1983) (Rehnquist, J., dissenting).

injunctive or declaratory relief, the Court now must conclude that there is no distinction under that statute between the two kinds of relief when state judges are sued.[11]

The rationale for absolute legislative immunity is that a "private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation [and] . . . legislative independence is [thereby] imperiled." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 503. The purpose of legislative immunity is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *Id.* at 502 (quoting *United States* v. *Brewster*, 408 U.S. 501, 507 (1972)). The rationale for absolute judicial immunity is precisely the same: to preserve judicial independence, to protect the integrity of the judicial process, and to prevent distraction of judicial attention from public responsibilities. Because the policies underlying the rules are identical, common sense dictates that the rules also be identical.

The absolute immunity of federal legislators from suits for damages and for declaratory or injunctive relief is grounded partly in the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. *See Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 501-03. But in extending the absolute immunity of federal legislators to their state counterparts, the Court relied not on the Speech or Debate Clause but on the policy that "the purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 731.[12] These important public policy con-

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[11] In *Consumers Union* the Court stated: "[W]e did not distinguish [in *Tenney* v. *Brandhove*] between actions for damages and those for prospective relief." 446 U.S. at 733.

[12] The Court's reasoning thereby implicitly refutes the argument that judicial immunity should not apply in suits for prospective relief because judicial immunity has no express constitutional basis. State

siderations are equally applicable to judicial immunity. Indeed, judicial independence may be more crucial to principled decision-making than legislative independence because the judge's job is always to maintain an unbiased, objective viewpoint while the legislator's job is, at least in part, to advocate the partisan interests of his constituents.

Considering the parallel historical development of the doctrines of legislative and judicial immunity, it would be inconsistent to distinguish in the judicial immunity context between actions for damages and those for prospective relief while not making such a distinction in legislative immunity cases. The Court in *Consumers Union* declined to adopt such an anomalous construction of section 1983, and the Court similarly should refuse to embrace such a construction here. The unqualified language of prior judicial immunity cases, the public policies underlying them, the legislative history of section 1983, and the strong analogy to legislative immunity support recognition of absolute judicial immunity in this case.

C. The existence of alternative remedies makes civil suits against judges unnecessary as a means of controlling unconstitutional judicial conduct.

An important factor in this Court's functional analysis of whether absolute immunity from suit is required to assure the independence of a particular official performing a particular task is whether there are alternative remedies available to the public to deter wrongdoing by that official or whether civil suits are the only realistic alternative. *See, e.g., Harlow* v. *Fitzgerald*, 102 S. Ct. at 2736; *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690, 2706 & n.38 (1982); *Imbler* v. *Pachtman*, 424 U.S. at 428-29. In the case of judges, the recognition by this Court of

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legislative immunity has no greater constitutional basis; yet the Court has not hesitated to recognize absolute legislative immunity as barring suits for injunctive or declaratory relief against state legislators.

absolute immunity has been expressly premised in part on "the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights." *Stump* v. *Sparkman*, 435 U.S. at 370 (Powell, J., dissenting). "The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges." *Butz* v. *Economou*, 438 U.S. at 512. Thus the nature of the judicial process itself and the safeguards built into it underlie absolute judicial immunity and make civil suits against judges unnecessary as a means of controlling unconstitutional conduct. *Briscoe* v. *Lahue*, 103 S. Ct. at 1115-16; *Butz* v. *Economou*, 438 U.S. at 512.

Appellate review is primary among the alternatives to a civil suit against a judge and was designed to serve as a corrective mechanism for erroneous judicial decisions. *Pierson* v. *Ray*, 386 U.S. at 554.[13] Mandamus and other special writs, collateral attack statutes, and state and federal habeas corpus are other available alternatives. State mechanisms to discipline judges may be invoked to deter or remedy judicial misconduct as, in extreme cases, may the right to impeach or recall judges. *See, e.g.*, *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) at 350, 354.[14] In

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[13] In fact, one commentator has suggested that the doctrine of judicial immunity originally developed to protect the appellate system from collateral attacks on judgments by channeling challenges to lower court actions through the appellate process. Block, *Stump* v. *Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879, 924.

[14] All 50 states, the District of Columbia and the federal government have procedures for receiving, investigating and adjudicating complaints against judges. American Judicature Society, *Judicial Conduct Organizations: Governing Provisions* (2d ed. 1982); *see* 28 U.S.C. § 372 (1976 & Supp. V 1981) (setting forth federal procedures).

states where judges are elected, judicial misconduct may be redressed at the ballot box; in states where they are appointed, wrongdoing may be brought to the attention of the Governor or other appointing authority at the time of reappointment. Finally, a judge may be prosecuted and face criminal sanctions under 18 U.S.C. § 242 (1976). *Dennis* v. *Sparks*, 449 U.S. 24, 28 n.5, 31 (1980); *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974).[15]

In this case Respondent Allen had been arrested for an offense which carried no jail time upon conviction and was incarcerated pending trial because he was unable to meet the $250 bail that had been set. He could have appealed the magistrate's bail determination through the Virginia court system, up to and including review by the Virginia Supreme Court or any justice thereof. Va. Code § 19.2-124 (Supp. 1982) (state procedure for appeal of bail determination). He also could have petitioned for state habeas corpus relief. Va. Code § 8.01-654 (1977 & Supp. 1982). In addition, in this as in other state criminal cases, Respondent, after having exhausted state court review procedures, could have sought federal court review through habeas corpus proceedings. 28 U.S.C. § 2254

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[15] The availability of these numerous alternative remedies distinguishes suits against state judges from those against state prosecutors. In concluding that prosecutors are not absolutely immune from suits for declaratory and injunctive relief, the Court reasoned that "[i]f prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims." *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 737. This reasoning is inapplicable to state judges because suits against judges ordinarily only occur after the judge has ruled against the putative section 1983 plaintiff. At that point the dissatisfied litigant has other procedures available to him to assert his federal constitutional claims. The availability of alternative remedies also distinguishes this case from those in which prospective relief is afforded to prevent enforcement of a presidential order. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

(1976). If Respondent had petitioned for habeas corpus relief, a federal district court could have granted such relief prior to the state trial on a showing by Respondent that the setting of bail was arbitrary or discriminatory or in violation of certain constitutional requirements. *Bowring* v. *Cox*, 334 F. Supp. 334 (W.D. Va. 1971).

Respondent's failure to pursue these state court remedies is itself a reason to bar his suit against a state magistrate in federal court. Although it has been held that exhaustion of state remedies is not a prerequisite to relief under section 1983, *Monroe* v. *Pape*, 365 U.S. 167 (1961), it is also clear that section 1983 should not be freely invoked in lieu of established state processes or federal habeas corpus. *See Allen* v. *McCurry*, 449 U.S. 90, 104 & n.24 (1980); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 608-09 (1975). In section 1983 cases, this Court has always been mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law," *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951), and it has noted that the Civil Rights Act of 1871 "should be construed so as to respect the proper balance between the States and the federal government in law enforcement." *Id.* at 121 (quoting *Screws* v. *United States*, 325 U.S. 91, 108 (1945)). Accordingly, when federal courts are requested to interfere with state judicial proceedings they should "abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 603.[16]

Under our federal system of dual sovereignties state court judges have a duty, equal to that of federal judges, to enforce and protect every right that is granted by the Constitution of the United States and to uphold federal law. *Sumner* v. *Mata*,

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[16] As this Court noted in *Huffman*, a state's judicial system should be accorded the opportunity to resolve federal issues that arise in its courts. 420 U.S. at 609. State judicial systems are deprived of this opportunity, however, when federal district courts are allowed to substitute themselves for the states' appellate courts.

449 U.S. 539, 549 (1981); *Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976); *Steffel* v. *Thompson*, 415 U.S. 452, 460-61 (1974). This Court has expressly and repeatedly rejected "the assumption that state judges will not be faithful to their constitutional responsibilities," *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 611, and has expressly stated that "elected judges of our state courts are fully competent to decide federal constitutional issues." *Swain* v. *Pressley*, 430 U.S. 372, 383 (1977); *accord District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. 4285, 4291 n.16 (U.S. Mar. 23, 1983); *Sumner* v. *Mata*, 449 U.S. at 549; *Allen* v. *McCurry*, 449 U.S. at 105. When constitutional issues arise, state court judges are entirely competent to handle them subject to review by this Court. *See Kugler* v. *Helfant*, 421 U.S. 117, 124 (1975); *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 609.[17] Thus the federal courts should step in only "where the state courts [are] unable or unwilling to protect federal rights." *Allen* v. *McCurry*, 449 U.S. at 101. Accordingly, established principles of federalism counsel against permitting suits to be brought against state judges in federal courts and are yet another reason to recognize the doctrine of absolute judicial immunity for state judges in injunctive or declaratory relief cases.

II. Even If Suits Against Judges Are Not Entirely Precluded By The Judicial Immunity Doctrine, The Award Of Attorneys' Fees And Costs Against A Judge Is Barred.

A. The award of attorneys' fees and costs has the same coercive effect on judicial independence as the award of money damages.

Just as the threat of a suit for damages has a chilling effect on judicial independence, the threat of the grant of attorneys' fees

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[17] Indeed, as Justice O'Connor has said: "There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 813 (1981).

and costs has a similar chilling effect. Requests for attorneys' fees have no less coercive and intimidating effect on judges than do actions for damages. Even if the Court concludes that there is some difference in kind between a request for damages and a request for injunctive or declaratory relief justifying a different application of immunity principles, there is no such difference between damages and attorneys' fees or costs. Regardless of the type of monetary relief sought, the threat of adverse financial consequences harasses, intimidates and chills independent judicial decision-making.

The potential consequence of a monetary award against a judge is not lessened by labelling the award "fees" or "costs." To the contrary, the threat of the imposition of monetary liability has a coercive effect on judicial discretion regardless of the label attached to it. This Court has recognized that attorneys' fees awards are "financial penalties" and "effective enforcement weapons." *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). Fees granted pursuant to section 1988 are thus the functional equivalent of damages as a form of financial penalty. Their imposition denigrates the interests in judicial independence long protected at common law by absolute judicial immunity as much as does the award of damages.

The possibility that the state or local government may ultimately pay the attorneys' fees award for a judge pursuant to an indemnification statute does nothing to lessen the coercive effect. First, judges as conscientious public officials, who in some cases are elected, have an interest in conserving public funds. They certainly would avoid responsibility for expenditures of those funds caused by judicial dereliction. Second, this Court has never based its immunity decisions on the fact that awards for damages may ultimately be paid by the government rather than by the individual official. Despite the common knowledge that state indemnification statutes may insulate state officials from having to pay damages even if they are held liable, the Court has reaffirmed the doctrine of judicial immunity in damages actions. *Stump* v. *Sparkman*, 435 U.S.

at 364.[17] The same result should obtain with respect to fees and costs even though many of the same statutes indemnify public officials for attorneys' fees and costs as well as for damages. Third, even when there is a state indemnification statute, a judge often cannot know with certainty in advance of making a decision whether or not attorneys' fees and costs will be paid by the state.[18] Most indemnification statutes are subject to a number of exclusions, and it may not be warranted to assume that governments actually pay fees and costs for their officials. *See* Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1191, 1194 (1977). Moreover, under many indemnification statutes, state or local governments are authorized to defend a public official or pay damages, fees and costs only if the official acted in good faith.[19] Such a determination of whether one acted in good faith is precisely like the inquiry required where qualified immunity applies, *see, e.g., Butz* v. *Economou*, 438 U.S. at 497-98; *Imbler* v. *Pachtman*, 424 U.S. at 419 nn. 13-14, and qualified immunity has never been thought to be sufficient protection for judges.

Particularly for local courts with small administrative budgets, attorneys' fees awards levied against a judge

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[17] Many states fully indemnify state officers for judgments against them as long as the officers acted within the scope of their official duties. *See, e.g.*, Cal. Gov't Code §§ 825, 825.2 (Deering 1982) (complete indemnification except for fraud, corruption or actual malice); Iowa Code Ann. §§ 25A.21, 25A.23, 613A.8 (West 1978 & Supp. 1982) (complete indemnification except for willful or wanton conduct); N.Y. Pub. Off. Law § 17(1) (McKinney Supp. 1982) (complete indemnification except for willful and wrongful acts or gross negligence).

[18] Some indemnification statutes permit but do not require public entities to indemnify their employees. *See, e.g.*, Me. Rev. Stat. Ann. tit. 14, § 8112 (1964); Mass. Ann. Laws ch. 258, § 9 (Michie/Law. Co-op. 1980); Mich. Stat. Ann. 3.996(108) (Callaghan Supp. 1983).

[19] *See, e.g.*, Del. Code Ann. tit. 10, §§ 4001-4002 (Supp. 1982); Kan. Stat. Ann. § 75-6116 (Supp. 1979); Wash. Rev. Code Ann. § 4.92.070 (Supp. 1982).

threaten the independence of the judiciary within the local government system. Such awards may force the local court to approach the legislature with hat in hand and place the judiciary at the mercy of the legislature's appropriations process for indemnification. Moreover, the imposition of attorneys' fees may also place the judiciary at the mercy of the state executive branch. Indeed, many state indemnification statutes require that the governor or attorney general authorize the employment of defense counsel or the payment of costs and attorneys' fees.[41] Thus the imposition of attorneys' fees and costs on state judges has serious implications for the separation of powers within the states.

B. The legislative history of section 1988 does not reveal any intent to abrogate judicial immunity and thereby subject judges to awards of attorneys' fees.

By enacting the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), Congress did not intend to abolish the doctrine of absolute judicial immunity and thereby subject judges to awards of attorneys' fees. The court of appeals erroneously relied on two sentences and one footnote from the House Report on section 1988 in concluding that Congress intended to allow attorneys' fees to be awarded against judges. That portion of the House Report provides as follows:

> Furthermore, while damages are theoretically available under the statutes covered by [section 1988], it should be observed that in some cases, immunity doctrines and spe-

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[41] *See, e.g.*, Ky. Rev. Stat. § 12.210 (1980) (Governor, or any department with Governor's approval, may employ defense counsel); R.I. Gen. Laws § 9-31-12 (Supp. 1982) (State reserves right to determine whether or not it will indemnify public official); S.D. Codified Laws Ann. §§ 3-19-1 to 3-19-3 (1980) (governing board of political subdivision or Attorney General determines whether or not it will indemnify public official); *cf.* Tenn. Code Ann. §§ 8-42-101 to 8-42-108 (Supp. 1982) (commission headed by State Treasurer must authorize payment of costs and employment of defense counsel).

> cial defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976) (text of footnote omitted). Footnote 17 to this section of the House Report cites *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); and *Pierson* v. *Ray*, 386 U.S. 547 (1967).

Wood and *Scheuer* define the scope of the qualified immunity available to state executive officials; neither case mentions absolute immunity for judges or other officials or any "special defenses" available to public officials. *Pierson* deals with the special defense of probable cause to arrest and the good faith qualified immunity accorded to law enforcement officials in defending section 1983 actions. 386 U.S. at 557. Although *Pierson* also reaffirms the absolute immunity of judges from damages suits, the citation to *Pierson* in the House Report undoubtedly was intended to illustrate the "special defenses" or the "[qualified] immunity doctrines" available to law enforcement officials. It was not intended to effect the absolute immunity of judges.

Further support for this interpretation is inherent in the very definitions of absolute and qualified immunity. Absolute immunity "defeats a suit at the outset" while the defense of qualified immunity "depends on the circumstances and motivations of [the official's] actions as established by the evidence at trial." *Imbler* v. *Pachtman*, 424 U.S. at 419 n.13. Because attorneys' fees and costs may be awarded to the prevailing party under section 1988 only after trial or judgment, a stage which is never reached in a case where the defendant official has absolute immunity, the language of the House Report must logically be interpreted as referring only to qualified immunity and other special defenses. Thus the reference to *Pierson* in the House Report was necessarily intended to illustrate the special defenses for law enforcement officials defined in that

case; it was not meant to abrogate the doctrine of judicial immunity.

More important, reliance on the House Report when attempting to determine the meaning of section 1988 is somewhat questionable because both Houses of Congress debated and voted on the Senate bill. While the Judiciary Committees of both the Senate and the House drafted bills to provide for attorneys' fees under the civil rights statutes, both houses debated and passed the Senate version (S. 2278, 94th Cong., 2d Sess. (1976)). *See* 122 Cong. Rec. 33,312 (1976); 122 Cong. Rec. 35,130 (1976). In addition, neither bill mentioned common law immunities. *See* S. 2278, 94th Cong., 2d Sess. (1976); H.R. 15460, 94th Cong., 2d Sess. (1976).

The statute was enacted in response to this Court's ruling that statutory authority was a prerequisite to court-ordered attorneys' fees awards under certain civil rights statutes. S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5911 (referring to the decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1976)). The Senate Report specifically stated that the bill "creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's *[Alyeska]* decision." S. Rep. No. 1011, 94th Cong., 2d Sess. 6., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913.

During the floor debates on the bill, numerous Congressmen and Senators reaffirmed this interpretation. Senator Kennedy, the floor leader of the bill, explained:

> The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws.

122 Cong. Rec. 31,472 (1976). The Chairman of the House subcommittee described the bill as "only a first step and a

rather limited and cautious one. It does not overturn law or practice, except the *Alyeska* case." 122 Cong. Rec. 35,126 (1976) (remarks of Congressman Kastenmeier). In addition, the author of the House bill, Congressman Drinan, stated:

> [T]here is no change in the substantive preexisting law in this case before this body at this time. We accept preexisting law, whatever it is . . . . We do not create any new statutory right of action in the bill today . . . . I think [attorneys' fees are] . . . all carefully regulated by a body of law which goes back at least 50 years, and this would not be necessary, namely, to put through a law at all had it not been for a technical decision in the U.S. Supreme Court."

122 Cong. Rec. 35,116-18 (1976).

The expressions of the authors of a bill are normally entitled to substantial weight. *See, e.g., Brown* v. *General Services Administration*, 425 U.S. 820, 828 (1976). Because the legislative history does not indicate any intent to abolish absolute judicial immunity, the court of appeals in this case incorrectly concluded that judicial immunity had been abolished. A single general reference to common law immunities in the House Report to section 1988 does not indicate Congress' intent to abolish the doctrine of absolute judicial immunity and to permit the award of fees and costs against state judges.

CONCLUSION

The decision of the court of appeals should be reversed because judicial immunity bars suits for injunctive or declaratory relief or, at the very least, because immunity bars the award of attorneys' fees and costs against a state court judge.

Respectfully submitted,

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Amicus Brief

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82-1432

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In The

Supreme Court of the United States

October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

vs.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE HONORABLE LAWRENCE H. COOKE, CHIEF JUDGE OF THE STATE OF NEW YORK

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No. 82-1432

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October Term, 1982

GLADYS PULLIAM, Magistrate for the County of Culpeper, Virginia,

Petitioner,

vs.

RICHMOND R. ALLEN and JESSE W. NICHOLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE HONORABLE LAWRENCE H. COOKE, CHIEF JUDGE OF THE STATE OF NEW YORK

INTEREST OF THE *AMICUS CURIAE*

This action presents crucial issues concerning the scope of judicial immunity under 42 U.S.C. §1988. The United States Court of Appeals for the Fourth Circuit held that Congress, in enacting

a right to award attorneys' fees for actions under certain civil rights laws, intended for attorneys' fees to be awarded against officials subject to orders of prospective relief but not "otherwise" subject to damage awards (Petition for Certiorari, p. 30), and thereby abrogated the common law rule that judges are immune from suit for monetary relief for acts performed in their official judicial capacities.

The *amicus curiae* is the Chief Judge of the State of New York and the Chief Judge of the New York State Court of Appeals. He is New York State's chief judicial officer and is responsible for, *inter alia,* the administration and operation of the entire Unified Court System of the State with its 1,062 judges of courts of record, and 2,318 town and village justices. New York State Constitution, Article VI, §28. As Chief Judge, he must insure that the New York state courts operate effectively, free from any improper influences that may taint the impartial administration of justice. The decision of the Fourth Circuit in this action presents a direct threat to independent judicial decision-making.

BRIEF SUBMITTED PURSUANT TO RULE 36.2

The Honorable Lawrence H. Cooke, Chief Judge of the State of New York, submits this brief in *amicus curiae* pursuant to Rule 36.2 of the United States Supreme Court Rules with the consent of all of the parties.

SUMMARY OF ARGUMENT

The common law rule of absolute judicial immunity from suits for monetary relief is one of the underpinnings of the judicial system, evolving from the long-standing recognition that judges cannot properly perform their judicial roles if they are subject to harassment or intimidation through lawsuits for monetary

awards by dissatisfied litigants. Claims for attorneys' fees are no less coercive than actions for damages; the amounts of money involved in each can be equally substantial.

Congress can limit the well-established common law principle of judicial immunity only by express direction. *Pierson v. Ray,* 386 U.S. 547 (1967). In enacting 42 U.S.C. §1988, Congress did not expressly provide that the doctrine of absolute judicial immunity be abrogated. To the contrary, the debates in both the Senate and the House unequivocably indicate that the attorneys' fees bill was enacted merely to correct a legal technicality, leaving unchanged the common law with respect to absolute immunity. There was no legislative intent that the doctrine of absolute judicial immunity be subverted by monetary awards granted under the guise of attorneys' fees.

ARGUMENT

I.

JUDGES ARE IMMUNE FROM LIABILITY FOR ATTORNEYS' FEES IN ACTIONS PURSUANT TO 42 U.S.C. §1988.

A. The common law concept of absolute judicial immunity forecloses demands against judges for attorneys' fees.

"Few doctrines [are] more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." *Pierson v. Ray, supra,* 386 U.S. at 554-555. This doctrine, prevailing in English jurisprudence for centuries, was established as the "American Rule" in *Bradley v. Fisher,* 13 Wall. 335 (1872), over one hundred years ago.

Absolute immunity is a "total shield from liability" that protects a judge from "potentially disabling threats of liability." *Harlow v. Fitzgerald,* ____ U.S. ____, 102 S. Ct. 2727, 2732, 2736 (1982); *cf. Butz v. Economou,* 438 U.S. 478 (1978) [Absolute immunity is "a full exemption from liability"]. It thereby insures that "a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. . . ." *Id.* at 345; it enhances "principled and fearless decision-making." *Pierson v. Ray, supra,* 386 U.S. at 554; *Stump v. Sparkman,* 435 U.S. 349 (1978). "Absolute immunity is thus necessary to assure that judges . . . can perform their respective functions without harassment or intimidation." *Butz v. Economou,* 438 U.S. 478, 512 (1978); *see Ferri v. Ackerman,* 444 U.S. 193, 203-04 (1979).

Whether a monetary award is designated as "attorneys' fees" rather than "damages" makes not an iota of difference with respect to the "potentially disabling threat of liability" that absolute immunity is designed to eliminate. Actions for attorneys' fees are no less coercive than actions for damages; attorneys' fees often are substantial,[1] and the very interests underlying judicial immunity are thus involved — the fear of "intimidation" and the erosion of the public's interest in an independent judiciary. Justice Powell, in his dissenting opinion in *Maine v. Thiboutot,* 448 U.S. 1 (1980), presaged the onslaught of "harassment" and

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1. The standards in New York for awarding attorneys' fees pursuant to §1988 in actions brought under 42 U.S.C. §1983 are "the same standards as in other complex federal litigation", regardless of the nonprofit or public interest nature of the legal work. *See, e.g., Beazer v. New York City Transit Authority,* 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds,* 400 U.S. 568 (1979). Since the going rate for "reasonable" attorneys' fees in New York State may be over $100 per hour, and may approach almost $200 per hour in New York City, even a relatively straightforward §1983 action will entail thousands of dollars of attorneys' fees against the public officer sued.

"intimidation" which might virtually eliminate the judicial independence of judges once they are exposed to liability for attorneys' fees, stating that "[t]here is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees . . . ingenious pleaders may find ways to recover fees in almost any suit against a state defendant." 448 U.S. at 24.

Judges are especially vulnerable targets of these "ingenious pleaders"; though immune from damage actions pursuant to §1983, they continually will be subject to allegations of constitutional due process violations by reason of rulings made in cases over which they preside. It takes no great degree of legal skill to bring a §1983 action for injunctive or declaratory relief to challenge a judge's ruling, with the concomitant right to attorneys' fees under §1988, regardless whether damages are sought. Indeed, issues normally raised by the vehicle of a mandamus proceeding easily can be restated as constitutional claims against judges under the civil rights acts. In New York, where the state courts have jurisdiction to hear §1983 actions, and consequently award attorneys' fees under §1988, *see Matter of Johnson v. Blum*, ____ N.Y. 2d ___ (1983), parties are beginning to bring such actions against judges to challenge judicial rulings that otherwise would be challengeable by the commonplace mandamus and prohibition proceedings pursuant to Article 78 of the New York Civil Practice Law and Rules. The reason for this tactic is the potential availability of attorneys' fees.

The existence of an extensive system of state and federal appellate courts is plain evidence that judges are capable of making errors. It would be unthinkable that awards of attorneys' fees could be made against judges for every successful appeal from their decisions, based upon the mandates of the appellate courts that enjoin the enforcement of those decisions. Yet, as public officers whose every act is "state action", they are especially

vulnerable to challenges to these very errors being made through the use of §1983 actions.

That "costs" rather than "damages" constitute the relief sought does not lessen the impact on judicial independence. Insofar as the liability of a judge is concerned, the label is irrelevant. *Cf. Johnson v. University of Bridgeport and Local 1199, Drug and Hospital Union,* 629 F.2d 828 (2d Cir. 1980), in which the Court of Appeals for the Second Circuit noted that statutorily authorized attorneys' fees are no different from attorneys' fees that are a contractually stipulated element of damages. Even the court below in the instant case equated attorneys' fees with damages.[2] Attorneys' fees granted pursuant to §1988 are but another form of financial liability that can be used as a weapon against judges in contravention of the very interests this Court has held protected by the concept of absolute judicial immunity.

Nor does it matter whether the demand for attorneys' fees is made against the judge in his official capacity with payment coming from the Public Treasury, or in his individual capacity, with payment coming directly from the judge. The cases applying absolute immunity to judges make no distinction as to how monetary awards ultimately may be paid. It is a fiction to believe that judges would not be intimidated by the threat of a suit for attorneys' fees simply because the money would not come out of their own pockets. The budget of the courts of which the judge is a part would be sharply affected by the payment of any monetary awards. This is particularly true of small localities, where an attorneys' fee award against a local magistrate may severely strain

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2. ". . . Congress intended for attorney fees to be awarded under §1988 to claimants who obtain prospective relief against an official *but who otherwise are barred from recovering damages* against the official." (emphasis supplied).

the local fisc and affect funding for court operations.[3] Thus, even if the award comes from the public fisc, the intimidation factor still would be present, and application to judges of the attorneys' fees provision of §1988 would provide for the very type of intimidating litigation that has been foreclosed by the common law for centuries.[4]

B. Congress did not erode any existing common law immunities for judges in enacting §1988.

Absolute immunities so firmly rooted in the common law and supported by such strong public policy reasons are not easily abolished. *Imbler v. Pachtman,* 424 U.S. 409, 435 (1976) (concurring opinion); *Pierson v. Ray, supra,* 386 U.S. at 554; *see also, Owen v. City of Independence, Missouri,* 445 U.S. 622, 667 (1980) (dissenting opinion). Abrogation of such immunities must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the

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3. In New York State, there are 2,318 town and village justices serving part-time in local justice courts to hear small civil matters and minor criminal violations. They are, for the most part, paid nominal salaries by the individual towns or villages and frequently are assigned neither staff nor formal facilities. A large percentage of these justices are not lawyers. Any attorneys' fees awards flowing from a mistake made by any of these local town and village justices would have a severe impact on the budgets of their localities, many of which have extremely small populations and minimal municipal resources.

4. This brief does not address the question whether the absolute immunity of judges extends to suits for declaratory or injunctive relief absent monetary awards, a question left open by this Court in *Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719 (1980). Since, as set forth above, attorneys' fees are equatable with monetary damages for the purpose of determining the applicability of the doctrine of judicial immunity, there is no need for this Court to reach that question. If judges were absolutely immune from any lawsuits whatever, they, of course, would not be subject to §1988 attorneys' fees awards. *Consumers Union, supra.*

interests behind it" (*Owen v. City of Independence, Missouri, supra,* 445 U.S. at 638, quoting *Imbler v. Pachtman*) and is dependent on a "clear indication" that the Legislature "specifically" intended to abolish the common law immunity. *Pierson v. Ray, supra,* 386 U.S. at 554, 555; *cf. Supreme Court of Virginia v. Consumers Union of the United States, supra,* 446 U.S. at 738. There is no basis whatever for any finding that Congress "specifically" intended to abolish the "total shield from liability" (*Harlow v. Fitzgerald, supra,* 102 S.Ct. at 2736) encompassed by absolute immunity.

The sole legislative citation for the Fourth Circuit's conclusion that Congress intended to abrogate the absolute immunity of judges, is a single sentence in a House Report:

> "Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected."

The history of the enactment of §1988 shows beyond a doubt that this sentence from the House Report is not indicative of the legislative intent and that, even if "immunity doctrines" were considered, there was no intent whatever to abrogate *absolute* immunities by permitting the award of attorneys' fees.

At the time the legislation which ultimately came to be §1988 was being considered in Congress, bills to add an attorneys' fee provision to certain civil rights statutes were drafted by the

Judiciary Committees of both the Senate (S.2278) and the House of Representatives (H.R.15460). The bills were substantially identical, except that the Senate bill did not contain a reference to Title IX of the Civil Rights Act. *See* 122 Cong. Rec. 31472. The Senate bill was debated and passed by the Senate in a version that added the reference to Title IX and, in addition, added a provision pertaining to proceedings under the Internal Revenue Code. 122 Cong. Rec. 33312. The House bill never reached the floor of the House; instead, the House debated and passed the Senate bill that already had been passed by the Senate. 122 Cong. Rec. 35130.

The Senate Report, by its Judiciary Committee [S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976), reprinted in U.S. Code Cong. and Ad. News 5908], contains not a word that absolute immunities would be affected by the bill. Indeed, there is no discussion of common law immunities in the report.[5] The stated purpose of the bill in the Senate Report was simply to make consistent the patchwork provisions for attorneys' fees in various civil rights legislation, in light of this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1976), that statutory authority was needed to award attorneys' fees under those acts. S. Rep. No. 94-1011, *supra,* at 4; U.S. Code Cong. and Ad. News, *supra,* at 5911. The Senate Report concludes (*id.* at 6, U.S. Code Cong. at 5913):

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts

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5. The one sentence in the report that discusses the mechanics of the payment of awards of attorneys' fees expressly envisions the retention of the "traditional bad faith standard" for the award of attorney's fees (S. Rep. No. 94-1011, *supra,* at 5, n.7) — a standard that could have no application to individuals protected by absolute immunity. *Cf. Hutto v. Finney,* 437 U.S. 678, 700 (1978).

> are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's [Alyeska] decision."

Moreover, when the bill was debated on the floor of the Senate, nothing was said about any common law immunities. 122 Cong. Rec. 31271, 31470-31483, 31487-31490, 31829-31835, 31846-31858, 31868, 32171-32172, 32175-32176, 32183-32185, 32296-32298, 32383-32384, 32387-32398, 32405, 32926-32927, 32929-32934, 33310, 33315. As Senator Kennedy, the floor leader of the bill (122 Cong. Rec. at 31473), explained (*id.* at 31472):

> "The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws."

The House debated the Senate bill, which already had been passed. Here, as well, nothing was said about immunities. *See id.* at 35114-35130. To the contrary, Representative Drinan, the author of the House bill (*id.* at 35116) stated:

> ". . . [T]here is no change in the substantive preexisting law in this case before this body at this time. We accept preexisting law, whatever it is. . . ." (122 Cong. Rec. at 35116).

* * *

> "We do not create any new statutory right of action in the bill today." (122 Cong. Rec. at 35117).

* * *

> "I think [attorneys' fees are] . . . all carefully regulated by a body of law which goes back at least 50 years, and this would not be necessary, namely, to put through a law at all had it not been for a technical decision in the U.S. Supreme Court." (122 Cong. Rec. at 35118).

Indeed, Representative Kastenmeier, the chairman of the House subcommittee studying these bills (122 Cong. Rec. at 35126), stated (*id.*):

> ". . . [T]his is only a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case."

The authors of the House bill, in explaining the Senate bill to their colleagues, said nothing about immunity defenses. The expressions of the authors of the bill are entitled to substantial weight, *see, e.g., Brown v. General Services Administration,* 425 U.S. 820, 828 (1976).

The intent of Congress cannot be inferred from the report of one committee: Congress "as a whole" must be aware of an issue. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 192 (1978). Where House and Senate reports differ as to the interpretation of language in a bill, the House Report cannot be relied upon where, as here, by passing the Senate bill without amendment, the House denied the Senate committee and the entire Senate an opportunity to object to (or concur with) the interpretation written in the House Report. *Vaughn v. Rosen,* 523 F.2d 1136, 1142-1143 (D.C. Cir. 1975); *Hawkes v. Internal Revenue Service,* 467 F.2d 787, 797 (6th Cir. 1972); *see* Davis, *Administrative Law Treatise,* (1970 Supp.) §3A.31 at 175.

In light of this legislative history, there can be no awards of attorneys' fees against judges. The very basis for absolute

immunity of judges is the need for freedom from fear of liability for monetary awards, whether called "damages", "fees", "costs" or anything else. Regardless of nomenclature, the consequences of awards of each are exactly the same. Absolute immunity is a "total shield from liability". *Harlow v. Fitzgerald, supra.* If Congress intended to abrogate this "total shield", and permit the award of monetary relief against judges, it would have to have spoken directly to this issue. It did not do so. There is no "clear indication" that Congress "specifically" overrode the well-established immunity protecting judges against suits for monetary relief for acts in their judicial capacities. *Pierson v. Ray, supra.*

CONCLUSION

For the above stated reasons, the order of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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No. 82-1483

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

GLADYS PULLIAM,
Magistrate for the
County of Culpepper, VA.,

Petitioner

v.

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE HONORABLE ABRAHAM J. GAFNI, COURT ADMINISTRATOR OF PENNSYLVANIA, IN SUPPORT OF THE POSITION OF GLADYS PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPPER, VIRGINIA

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No. 82-1483

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

GLADYS PULLIAM,
Magistrate for the
County of Culpepper, VA.,

Petitioner

v.

RICHMOND R. ALLEN and
JESSE W. NICHOLSON,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief Amicus Curiae of the Honorable Abraham J. Gafni, Court Administrator of Pennsylvania, in Support of the Position of Gladys Pulliam, Magistrate for the County of Culpepper, Virginia

THE INTEREST OF THE HONORABLE ABRAHAM J. GAFNI, COURT ADMINISTRATOR OF PENNSYLVANIA

The Court Administrator of Pennsylvania is a Pennsylvania constitutional officer and his office is created by state statute. *See* Pennsylvania Constitution, Art. V, §10; Act 1976, July 9, P.L. 586, No. 142, 42 Purdon's Pennsylvania Consolidated Statutes (Pa.C.S.A.) §1901, *et seq.*

The Court Administrator is responsible for the prompt and proper disposition of the business of all courts in Philadelphia, Pennsylvania Rules of Judicial Administration[1] (Pa.R.J.A.), Rule 501, and for the provision of legal representation to the state's Judiciary. Pa.R.J.A. §505(15).

1. In re: Pennsylvania Rules of Judicial Administration, No. 27 Court Administator, Docket No. 1, Supreme Court of Pennsylvania, March 15, 1972.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

The Honorable Abraham J. Gafni, Court Administrator of Pennsylvania, submits this brief in *amicus curiae* pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

ARGUMENT

At issue in this case is whether, by enacting the Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 (Supp. 1980) ("1988"), Congress intended to abrogate the Common Law doctrine of absolute judicial immunity with respect to fee awards, and if it did so intend, whether that action of the legislative branch was violative of the constitutional guarantee of Due Process and of the principle of Separation of Powers.

The case presents the important and unresolved question of whether attorney's fees under 42 U.S.C. §1988 may be awarded against a judge acting in his judicial capacity. The Court of Appeals for the Fourth Circuit has in this case approved such an award. This ruling threatens the independence of state judges, and is contrary to the deeply-rooted policies which underlie the principle of judicial immunity.

JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AGAINST JUDGES UNDER 42 U.S.C. §1988.

As this Court has often observed, the absolute immunity of judges for acts committed within their judicial jurisdiction has roots extending to the earliest days of the common law; few doctrines are more solidly established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 418 and 422n.20, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

In *Pierson v. Ray, supra*, this Court held that this settled principle of the law was not abolished by 42 U.S.C. §1983. The Court observed that the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. The Court would not presume that an abrogation had been attempted without a specific provision to that effect.

What was not determined in *Pierson* was whether Congress had the right to abolish the doctrine of judicial immunity adopted by this Court in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872).

It is a basic proposition that this Court will adopt one of two possible constructions of a statute which will save and not destroy it, and the Court will not attribute to Congress an intent to defy the due process clause of the Fifth Amendment to the Constitution of the United States or even to come so near to doing so as to raise serious questions of constitutional law. *Anniston Mfg. Co. v. Davis*, Ala. 1936, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143, *reh. denied*, 302 U.S. 772, 58 S.Ct. 3, 82 L.Ed. 599. Thus, when this Court concluded that Congress, in the passage of 42 U.S.C. §1983, did not manifest an intent to abolish judicial immunity, it did not of necessity conclude that had Congress meant to do so, it would have had a commensurate right.

That this Court in *Pierson v. Ray, supra*, was construing §1983 to save it is evidenced by the Court's repetition immediately prior to its holding on this issue of the language in *Scott v. Stansfield*. L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, 13 Wall at 349-350 20 L.Ed. 646:

> [I]t "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

The Court continued:

> It is the judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants.
>
> [H]e should not have fear that unsatisfied litigants may hound him with litigation . . . . Imposing such

a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Having first stated that the doctrine of judicial immunity preserved the independence of the judiciary to the sole benefit of the public, it is submitted the Court cannot be said to have tacitly conceded that Congress, while not intending that time to abolish this keystone of judicial process, could do so at any time it liked.

From this Court's adoption of the immunity doctrine in *Bradley v. Fisher, supra*, to its most recent pronouncement, *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed. 2d 185 (1980), the purpose of immunizing judges has been clearly stated: "The point . . . is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, 203-204, 100 S.Ct. 402, 62 L.Ed. 2d 355 (1979). To allow attorney's fees against judges would be to defeat this purpose. Such fee allowances would inescapably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddel*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.) *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

Assuming arguendo that Congress intended to abolish judicial immunity with the passage of the Attorneys' Fees Awards Act, this action by the legislative branch of government is in violation of Constitutional guarantees of fundamental fairness and due process.

The Fifth Amendment to the Constitution of the United States announces and reaffirms the ancient principles of Common Law and prevents them from being unjustly invaded by the power of the federal government.

This clause is a restraint and limitation on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave

Congress free to make any process "due process of law" by mere will. *Murray v. Hoboken Land*, N.J. 1856, 59 U.S. 277, 18 How. 277, 15 L. Ed. 372. The amendment forbids the federal government from depriving any person of life, liberty or property without due process of law. *Bloom v. State of Illinois*, Ill. 1968, 391 U.S. 194, 88 S.Ct. 1477, 20 L. Ed.2d 522. And it is this Court which is the final arbiter of due process under the Constitution. *Gallagher v. Quinn*, 363 F.2d 301, 124 U.S. App. D.C. 172 (1966), *cert. denied*, 385 U.S. 881, 87 S.Ct. 167, 17 L. Ed. 2d 108 (1966).

Due process of law guaranteed by the Fifth Amendment is a primary and indispensable foundation of individual freedom. It expresses in its ultimate analysis respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization. Judicial immunity which guarantees that parties will receive a fair trial in a fair tribunal is a basic requirement of due process and is an ancient doctrine whose intent it is to prevent even a probability of unfairness. The right to fair trial may not be abrogated under any circumstances, *e.g.*, even if evidence of guilt of a criminal defendant is overwhelming. *Imbler v. Craven*, 298 F. Supp. 795 (D.C. Cal. 1969), *affd.*, 424 F.2d 631, *cert. denied*, 400 U.S. 865, 91 S.Ct. 100, 27 L. Ed. 2d 104 (1970). The influences from which the tribunal must be guarded against to insure that a fair trial is afforded have been enumerated and delineated extensively in the area of jury trials, because the judiciary's freedom from influence was assured. For example, where outside influences affecting a community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable safeguards, such as change of venue, to assure a fair and impartial trial. *Pamplin v. Mason*, 364 F.2d 1 (C.A. Tex. 1966). Under the holding of the Fourth Circuit in this matter, however, there is no escape to another locality, for all judges must now stand in fear of the

litigants before them, with the result that no litigant can be assured of receiving due process.

The independence of the judiciary from vexatious lawsuits of dissatisfied parties and from the branch of government which would be called upon to indemnify a judge against whom a judgment has been obtained must remain intact to avoid a chill on the unbiased discretion and decisions of judicial officers.

Absent a cloak of judicial immunity, the very source of justice would be poisoned, and a system would be introduced that could best be characterized as servile and incapable of impartiality as it was conceived in the concept of due process. *See Taafee v. Downes*, 13 Eng. Rep. 15, 17 (C.P. Ireland 1813); *Lining v. Bentham*, 2 S.C.L. (2 Bay) 1, 3 (1796). Examined from another point of view, the doctrine of immunity insures that there is some finality in the judicial proceedings — some point in the administration of the law where unqualified confidence is to be reposed and acknowledged. Further, where a judge must spend one hour at the bar — next at the bench, of the same or some other court, he will have a busy and harassing time, getting from one point to the other — from the Judge to the accused — from the corrector to the corrected. Thus, it is a great diseconomy and disservice to the public to poison the wells of justice for the sake of providing an incentive to civil rights litigants where one of the greatest civil rights of all, due process, is destroyed in the balance.

Without the doctrine of immunity, responsible and capable persons will be discouraged from seeking judgeships, for they will be unwilling to risk their property and time defending against litigants offended by adverse decisions. And, the imposition of attorneys' fees on those who are judges produces no different effect upon judicial discretion and decision-making processes than does the imposition of damages. Quite simply, there is no distinction between damages and awards which justify the abrogation of what this Court referred to as a solidly es-

tablished policy of judicial independence for the benefit of the public. *Pierson v. Ray*, 386 U.S. at 553-554.

While it may be argued that because the government unit the judges serve will actually pay the fee awards and that, therefore, judicial independence will remain unencumbered, this logic is faulty. Firstly, were this the case, no harm would come from the assessment of damages. Secondly, the award against the judge would be reported to the public as such, creating in the judge's mind a fear that confidence in his abilities will be eroded no matter who pays the bill. Thirdly, the state may develop defenses or otherwise delay in paying awards, with the effect of making the judiciary dependent on that branch which disburses the funds.

An award against a judge in his individual capacity, if it were not barred by judicial immunity, would probably be paid in practice from public funds. A suggestion that judges would be unaffected by awards against the funds of their offices does scant justice to their sense of public responsibility. The prospect of large, if not crippling, fee awards against the public funds with which they are entrusted would be profoundly disturbing to all conscientious jurists. This concern would be heightened both by the dramatic proliferation of §1983 suits in recent years, and by the fact that attorney's fee awards of $50,000 and more are becoming commonplace. Only the most sanguine observer would insist that such a continuing risk would not influence judicial decision-making, if only subtly and subconsciously.

This intimidating influence would be enhanced by the fact that fee awards under §1988 are to be collected "*either directly from the official, in his official capacity, from funds of his agency or under his control,* or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976), U.S. Code Cong. & Admin. News (1976), 5908, 5913 (emphasis added). Unlike heads of sprawling governmental

departments, judges do not typically have at their disposal vast budgets capable of absorbing unforeseen costs of this magnitude. Instead, the effect of imposing fee awards would be to send state judges, hat in hand, to legislatures for a special appropriation to pay each fee award.

Further, the many state judges who are elected to office, as they are in Pennsylvania, will be held accountable to the electorate for having subjected taxpayers to substantial awards for costs.

That costs such as attorney's fees can indeed affect officials' decision-making is demonstrated by this Court's own decision in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).[2] There, this Court described attorney's fees as one of the "financial penalties" which may be used as "effective enforcement weapons" to elicit compliance with an injunction. *Id.*, 437 U.S. at 690. The Court noted that "the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation." *Id.*, 437 U.S. at 695n.24. Because this "weapon" can indeed shape the actions of officials, even when fees are awarded against public funds, it would be disingenuous to assert that the prospect of such costs will not have an intimidating effect.

Should §1988 be read, then, as abrogating judicial immunity? Such an abrogation is not lightly to be in-

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2. *Hutto v. Finney*, *supra*, held that the Eleventh Amendment does not bar an award of attorney's fees against a State in conjunction with the issuance of declaratory and injunctive relief. The absence of such an Eleventh Amendment bar, however, offers no guidance in determining whether, as against judicial officers, there remains a bar of judicial immunity. The policies of federalism which inform Eleventh Amendment analysis are also present here, because §1983 actions would place federal courts in the position of enjoining state judges, but the policies which give rise to judicial immunity are entirely distinct, and are independent of the concerns considered in *Hutto*.

ferred. *Pierson v. Ray, supra; Bauers v. Heisel*, 361 F.2d. 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 102, 87 S.Ct. 1367, 18 L.Ed. 2d 457 (1967); *cf. Tenny v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Judicial immunity is so firmly established that this Court concluded in *Pierson v. Ray*, 386 U.S. at 554-555, that "Congress would have specifically so provided had it wished to abolish the doctrine."

In this area, where the immunity in question is so deeply rooted, and where sensitive issues of federalism are implicated, the Court should not infer an abrogation of immunity in the absence of explicit statutory language.[3] Here, the statute contains no such language. A single paragraph in the House Report stating that counsel fees are to be available "in some cases, [where] immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy," H. Rep. No. 94-1558, 94th Cong., 2d Sess., 9 (1976), does not demonstrate that Congress expressly considered judicial immunity and decided to abrogate it. The Report contains no express reference to judicial immunity and an intent to abrogate immunity cannot be inferred from the general reference to "immunity doctrines" and from the Report's citation of *Pierson v. Ray, supra*, along with two cases involving the qualified immunity of executive officials.

Ironically, it is the *Pierson* case which establishes that an intent to abolish judicial immunity must be expressly stated. Surely, if Congress had intended such an abrogation, the citation to *Pierson* is evidence of its awareness of the need to do so explicitly. Because *Pierson* involved not only a judge, but also police officers, and established the "special defenses" of good faith

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3. *Cf. Hutto v. Finney*, 437 U.S. at 706 (Powell, J. *concurring in part and dissenting in part*). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv.L.Rev. 682, 695 (1976).

and probable cause for police officers, the House Committee's citation to *Pierson* is at most ambiguous, and can equally be understood as referring to these "special defenses." Something more than this is required to abolish a principle so deeply rooted in our history and so essential to an independent judiciary. We join in the amicus brief filed in this matter by Chief Judge Lawrence H. Cooke of the State of New York with respect to further analysis of the legislative history.

Under the principle of separation of powers, the legislature is prohibited from encroaching on, or unduly burdening or interfering with, the judicial department in its exercise of judicial functions. Congress could not abrogate judicial immunity without violating this principle.

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. *Dennis v. Sparks, supra.*

Independence from that branch of government which would be called upon to indemnify the judiciary is equally necessary to avoid a posture of servility. Also to be avoided is the risk that another branch of government will impose upon the judiciary informal or formal sanctions for the latter's loss of a controversy.

The constitutional measures for controlling the judiciary are appellate process, criminal prosecutions, *see O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), legislation running to jurisdiction and powers, peer review and the like. But, when the power of the judiciary is eroded to the extent that due process cannot be afforded with ease, the judiciary is no longer a co-equal branch of government, for it can no longer perform the function for which it exists.

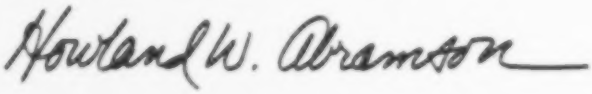
The Court of Appeals for the Third Circuit, has suggested that judicial immunity is so essential to the independence of the judiciary that it may be constitutionally mandated under the Guarantee Clause, as an indispensable attribute of a republican form of government. *Bauers v. Heisel*, 361 F.2d at 588-589. We concur.

An examination of this Court's opinion in the case of *Dennis v. Sparks, supra,* reveals the extent to which judicial immunity is inherent and necessary to the operation of the judicial branch. There, this Court had an opportunity to decide that where a judge conspires to commit a judicial act for unlawful purposes (in *Dennis,* the violation of 42 U.S.C. §1983) the judge's part in the conspiracy is not a judicial act, nor within his jurisdiction. Yet, this Court determined that judicial immunity attached under these circumstances. Because the judge was immune to a damage action in *Dennis,* attorneys' fees could not have been assessed under §1988. Yet, under the rationale of the case at bar, if the plaintiffs in *Dennis* had applied for injunctive relief and prevailed, attorneys' fees could have been awarded. This is antithetical to the concept of judicial immunity and internally inconsistent. If incentive for vindication of civil rights is not to be provided in damage actions, why should request for any other remedy which imposes financial liability be treated any differently? It is sufficient that prospective relief is obtainable.

CONCLUSION

For these reasons, the United States Court of Appeals for the Fourth Circuit should be reversed with respect to its holding that the Common Law doctrine of Judicial Immunity does not apply to counsel fees requested in civil rights actions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1983, I personally caused to be served upon the following, three copies of the Brief Amicus Curiae of the Honorable Abraham J. Gafni, Court Administrator of Pennsylvania, in Support of the Position of Gladys Pulliam, Magistrate for the County of Culpepper, Virginia, in the within matter, by mailing same, first class and postage prepaid, to:

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Amicus Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82–1432

GLADYS PULLIAM,
Petitioner

v.

RICHMOND R. ALLEN
and
JESSE W. NICHOLSON,
Respondents

IN SUPPORT OF AFFIRMANCE

On Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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IN THE
SUPREME COURT OF THE UNITED STATES
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GLADYS PULLIAM,
Petitioner

v.

RICHMOND R. ALLEN
and
JESSE W. NICHOLSON,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for
The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

INTEREST OF AMICUS

1. The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 2,000 lawyers who are citizens of every state, all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors, and judges of the state and federal courts.

2. Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

The purposes of the Association, as set out in its bylaws, are:

(a) To promote study and research in the field of criminal defense law and the related arts;

(b) To disseminate by lecture, seminars and publications the advancement of the knowledge of the law as it relates to the field of criminal defense practice;

(c) To promote the proper administration of criminal justice;

(d) To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases;

(e) To foster periodic meetings of defense lawyers and to provide a forum for the material exchange of information regarding the

administration of criminal justice and thereby concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures.

3. NACDL joins Respondents in seeking affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit, being convinced that attorney's fees such as those awarded in this case under 42 U.S.C. §1988 are proper and necessary to the vindication of important constitutional rights and therefore to the proper administration of criminal justice.

4. The National Association of Criminal Defense Lawyers has received the written consent of both parties for the filing of this brief.

STATEMENT OF THE CASE

Respondent Richmond Allen was arrested in Culpeper County, Virginia, on January 10, 1980, and was charged with using abusive and insulting language in public, in violation of *Va. Code Ann.* §18.2-416. Using abusive and insulting language is a Class 3 misdemeanor, punishable under Virginia law by a fine of not more than $500. *Va. Code Ann.* §18.2-11. Petitioner Gladys Pulliam, Magistrate for Culpeper County, set bond for Allen at $250, which Allen could not meet. Allen was held in the Culpeper County jail for fourteen days, until his trial on January 24, 1980.

Allen was brought to the General District Court on January 24, 1980, and was found guilty of using abusive and insulting language and released.

Respondent Jesse Nicholson was arrested four times in Culpeper for being drunk in public, in violation of *Va. Code Ann.* §18.2-388, a Class 4 misdemeanor punishable by a fine of not more than $100. He was required by the magistrate (on at least one occasion the magistrate was Gladys Pulliam) to post a $30 bond. When he could not post the bond, he was sent to jail; he was incarcerated for two days after his arrest on December 26, 1980, for four days after his arrest on December 30, 1980, for six days after his arrest on January 16, 1981, and for two days after his arrest on February 24, 1981.

The parties entered into the following stipulations at trial:

1. Magistrate Pulliam "on many occasions requires a cash bond of $30.00 for a person arrested for a Class 4 misdemeanor, and, if the bond be not met, she commits such person to jail awaiting trial."

2. Magistrate Pulliam "does also on occasion require a cash bond of $100.00 for violation of a Class 3 misdemeanor and, if such bond be not met, she commits such person to jail awaiting trial."

3. "Between September 30, 1980 and February 27, 1981, at least forty-nine (49) persons have been arrested for alleged violation of a Class 3 or Class 4 misdemeanor in connection with which a cash bond was required."

4. "Between September 30, 1980, and February 26, 1981, at least thirty-four (34) persons have been incarcerated for at least one day or night awaiting trial for alleged violation of a Class 3 or Class 4 misdemeanor."

See opinion of Judge Bryan, App. 25-26.

In Virginia, magistrates are appointed by the chief judge of the judicial circuit. *Va. Code Ann.* §19.2-35. Magistrates must pass a training course during the first six months of their four-year term (*Va. Code Ann.* §19.2-38), but there is no other education requirement for magistrates. *Va. Code Ann.* §19.2-38.1. Unlike federal magistrates, magistrates in Virginia need not be, and virtually never are, lawyers or people with legal training.

Allen brought suit under 42 U.S.C. §1983, alleging violations of his rights guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Allen moved for summary judgment. The Attorney General mounted a vigorous defense, but as the District Court noted, the legal support for the Attorney General's position was "anemic." App. 26.

On June 4, 1981, the United States District Court for the Eastern District of Virginia, the Honorable Albert V. Bryan, Jr., presiding, granted the motion for summary judgment as to the due process violation alleged, declared the practice of pre-trial incarceration to be unconstitutional, and entered an order enjoining further such pre-trial incarcerations. By further order dated July 6, 1981, Judge Bryan awarded Allen his costs of $7,691.09, including $7,308.00 in attorney's fees.

Petitioner did not appeal the award of prospective relief; the only issues presented to the Fourth Circuit were Petitioner's claims that she was immune as a judicial officer and that the amount of the fees was unreasonable. The Fourth Circuit affirmed, *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982).

SUMMARY OF ARGUMENT

When she ordered Respondents to be incarcerated for non-incarcerable offenses, Petitioner was not performing a "judicial" act. Her act could just as well have been performed by a clerk of court or a police officer. The act complained of was not a discretionary act. Respondents did not allege that she improperly set bail too high; the act complained of was rather the committal to jail. Because this involves no discretion, it is not in the nature of a judicial act.

Even if this Court were to deem Petitioner's actions to be "judicial", she is still subject to prospective relief to enjoin continuing violations of the rights of the public. The doctrine of judicial immunity should not be extended to bar prospective relief. The closest analogy is to the immunity afforded prosecutors, who are nonetheless subject to injunction. In a case in which Petitioner also denied Respondents their right to counsel, the suggestions that Respondents should have used other remedies such as an appeal or a petition for writ of habeas corpus is hollow.

The legislative history of 42 U.S.C. §1988 shows that Congress meant only to make the availability of attorney's fees co-extensive with the availability of prospective relief. Where prospective relief is appropriate, as here, attorney's fees are also appropriate as part of the costs of the proceeding. *Amicus* NACDL seeks to further the orderly administration of justice. In this case, the orderly administration of justice requires that some form of relief be available against magistrates to

stop unconstitutional practices that are likely to continue to evade review. Toward that end, the "private attorney general" concept of 42 U.S.C. §1988 requires that attorney's fees be assessed against Petitioner and to counsel for Respondents.

ARGUMENT

I.

Because The Act Of Committing A Defendant To Jail Is Not A Judicial Act, The Doctrine Of Judicial Immunity Does Not Apply To This Case.

This Court has recognized that a judge, immune from suit for actions taken in a "judicial" capacity, is not immune from suit for actions taken in an administrative or enforcement capacity. *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 724 (1980); *Supreme Court of Virginia* v. *Consumers Union of the United States*, ——— U.S. ———, 51 U.S.L.W. 3899, 3900 (June 20, 1983) (Burger, C.J., and Rehnquist, J., dissenting from denial of certiorari); *see generally Stump* v. *Sparkman*, 435 U.S. 349, 360-363 (1978).

The state has an interest in assuring the appearance at trial of even those charged with offenses for which no jail term may be imposed. To that end, a magistrate may require one charged with using abusive language to promise in writing to return for trial. *Va. Code Ann.* §19.2-123. The magistrate may also set a penalty for failure to appear by fixing an unsecured bond; the defendant would be liable for the amount of the bond if he

should fail to return at the proper time. If the defendant did not appear for trial, he would be charged with having violated *Va. Code Ann.* §19.2-128, a Class 1 misdemeanor punishable by up to twelve months in jail and/or a fine of $1,000.00. Once arrested for a violation of *Va. Code Ann.* §19.2-128, he could be required to post a cash bond as a condition of his release.

The specific acts of Magistrate Pulliam that Allen and Nicholson alleged, and which Judge Bryan found, to be unconstitutional, were their committals to jail when they were not able to post cash bonds. Allen did not allege that $100, as opposed to $50 or any other lesser amount, was an excessive bail; nor did Nicholson contend that $30, as opposed to any other amount, was excessive to assure his appearance for his trail.

Among the factors to be considered in deciding whether an act is a "judicial", as opposed to an "administrative", act is whether the act complained of involved the exercise of discretion or judgment. However, where the act complained of is essentially a ministerial act — one in which the judge is not called upon to use his judgment to choose among a number of choices — immunity does not apply. *Ex parte Virginia*, 100 U.S. 339 (1879). Thus a suit complaining that a judge had abused his discretion in setting bail and had fixed an excessive bail would clearly be barred.

However, the claim here is that Magistrate Pulliam performed a ministerial act — committing Richmond Allen to jail; alternatively phrased, she failed to commit the ministerial act of releasing Richmond Allen. The only "choice" that Magistrate Pulliam exercised was to choose

between two options: to follow the law by releasing Richmond Allen or to violate it by incarcerating him. That is not a 'choice" involving the use of judgment sufficient to be labeled a "discretionary" act.

Under the analysis of *Stump* v. *Sparkman*, 439 U.S. 349, 362 (1978), the act of committing Richmond Allen to jail is not a "judicial" act.

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

See also Gregory v. *Thompson*, 500 F.2d 59, 64 (9th Cir. 1974), holding that for a justice of the peace (or, in Virginia, a magistrate) to evict someone from his courtroom, a job normally carried out by a sheriff or bailiff, was "simply not an act of a judicial nature."

Under Virginia law, a defendant may be admitted to bail and released by any magistrate, any judge, any court clerk or deputy clerk (*Va. Code Ann.* §19.2-120) or by the arresting police officer or deputy sheriff (*Va. Code Ann.* §§19.2-74, -122). In the usual case, the officer arresting a defendant for a misdemeanor will make an initial determination about the likelihood that the defendant will appear at trial. If the officer believes that the defendant is likely to disregard

the summons, he may refer the matter to the magistrate. *Va. Code Ann.* § 19.2-74.[1]

All of these decisions, including the decision to admit to bail and to release, are performed by law enforcement officers. These decisions are not, therefore, "judicial" acts. Can there be any doubt that a police officer who held a defendant without admitting him to bail would be subject to suit? Police officers enjoy only a qualified immunity, with a defense of "good faith and probable cause." *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967); *Scheuer* v. *Rhodes*, 416 U.S. 232, 244-45 (1974).

This Court has previously held that whether an act is "judicial" depends on the character of the act and not the character of the agent. *Ex parte Virginia*, 100 U.S. 339 (1879); *Ex parte Rowland*, 104 U.S. 604 (1881). If the decision to admit a defendant to bail is "judicial", a police officer who holds a defendant without bail would be immune from suit.

The "judicial act" analysis performed by this Court in *Ex parte Virginia* and *Stump* v. *Sparkman*, *inter alia*, leads to the conclusion that the act of illegally committing someone to jail is not a "judicial" act. Judicial immunity therefore does not attach to Gladys Pulliam in this case.

1. Effective July 1, 1981, the Virginia General Assembly amended *Va. Code Ann.* § 19.2-74 to make clear that a defendant charged with a Class 3 or Class 4 misdemeanor may not be incarcerated, unless the charge is public drunkenness under *Va. Code Ann.* § 18.2-388, in which case the defendant can be held until he is no longer intoxicated.

II

Judicial Immunity Should Not Be Extended To Prohibit Prospective Injunctive And Declaratory Relief In Suits Brought Against Judges Under 42 U.S.C. §1983.

Although the question on which *certiorari* was granted involved only the propriety of an award of attorney's fees against a judicial officer, Petitioner argued at length (Brief, at 5-21) that prospective injunctive and declaratory relief cannot be granted against a defendant who is a judicial officer. Although Petitioner's failure to appeal the grant of relief means that that issue is not properly before this Court, that question underlies much of what Petitioner has properly preserved. Petitioner's suggestion that injunctive and declaratory relief may not be awarded against a judicial officer is plainly wrong, and such a holding would be an extension of the doctrine of judicial immunity unwarranted by any public policy.

A. THIS COURT HAS NEVER EXTENDED THE DOCTRINE OF JUDICIAL IMMUNITY TO BAR PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF.

This Court has implied that judicial immunity from actions for damages does not necessarily imply immunity from injunctive or declaratory relief.

> [W]e have held that judges defending against §1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. (Citations omitted). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief; we have not addressed the question.

Supreme Court of Virginia v. *Consumers Union of the United States*, 446 U.S. 719, 734-735 (1980).

The decisions of this Court disclose no hint that the doctrine of judicial immunity has ever been considered a bar to requests for injunctive or declaratory relief. This Court has upheld injunctions granted against judges acting in their judicial capacities in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), and in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). This Court has reversed injunctions granted against judges because no case or controversy was presented. *Boyle* v. *Landry*, 401 U.S. 77 (1971); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). In none of the four cases did this Court suggest that the issue of judicial immunity as a bar to relief.

B. OTHER IMMUNITIES FROM ACTIONS UNDER 42 U.S.C. §1983 SUPPORT THE AVAILABILITY OF PROSPECTIVE RELIEF EVEN WHEN DAMAGES ARE BARRED.

1. *State immunities* — For many years, this Court had held that state and local governmental entities were immune from suit under 42 U.S.C. §1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961). In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), that rule was modified to permit prospective injunctive relief, but not to permit a retroactive award of back pay. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court further modified *Edelman* by specifically permitting attorney's fees where prospective injunctive relief was granted, although damage suits were still not permitted. Holding that the attorney's fees would have only an "ancillary effect" on the state treasure, such an award was permitted, notwithstanding the Eleventh Amendment bar.

Ultimately, the distinction between prospective injunctive relief and retroactive relief for damages was negated in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), based on a reinterpretation of the legislative history of 42 U.S.C. §1983. The important lesson to be drawn from these four cases is that this Court held that an immunity to suit for retroactive, compensatory relief did not bar prospective injunctive relief, and it did not bar award of attorney's fees accompanying that prospective injunctive relief.

2. *Legislative Immunity* — This Court has consistently applied an absolute immunity to suit, whether for injunctive relief or for damages, to legislators and legislatures. The leading case is *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). This immunity is well grounded in the Speech or Debate Clause, *see Eastland* v. *United States Servicemen's*

Fund, 421 U.S. 491, 502-03 (1975), applied by analogy to state legislators in *Tenney* v. *Brandhove*, *supra*, and the doctrine of separation of powers, *see United States* v. *Gillock*, 445 U.S. 360 (1980). Of course, neither principle of constitutional law applies in this case.

3. *Executive Immunity* — The executive officials in both state and federal government have long enjoyed immunity, either qualified or absolute, to suits for civil damages. *Nixon* v. *Fitzgerald*, ____ U.S. ____, 73 L.Ed.2d 349, 360 (1982). However, such officials have also always been subject to the injunctive powers of the courts, and prospective injunctive and declaratory relief has always been available against these officials. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Nixon* v. *Fitzgerald*, ____ U.S. ____, 73 L.Ed.2d 349, 383 (1982) (White, J., dissenting); *cf. United States* v. *Nixon*, 418 U.S. 683, 706 (1974). The absolute immunity to damages conferred upon the President in *Nixon* v. *Fitzgerald* has never been extended to immunity to injunctive relief.

4. *Prosecutorial Immunity* — The cases of this Court setting forth the immunity enjoyed by prosecutors show that immunity from damages does not mean immunity from injunction. *See Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 736-737 (1980). In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), this Court held that prosecutors enjoyed the same immunity from suits for damages as that enjoyed by judges.

However, it has long been clear that prosecutors may be enjoined from performing their duties in unconstitutional ways. *Ex parte Young*, 209 U.S. 123 (1908); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). For example, this Court has upheld injunctions against a state prosecutor who sought to close down an adult bookstore under an unconstitutional obscenity law. *Mitchum* v. *Foster*, 407 U.S. 225 (1972).[2] *See also Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975). Other similar injunctions have been reversed by this Court, *see, e.g.*, *Hoffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Hicks* v. *Miranda*, 422 U.S. 322 (1975); *Doran, supra* — not because of any intimation of prosecutorial immunity, but because of the limits placed on such suits by this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971). Indeed, it was the profusion of suits enjoining prosecutions that led this Court to invoke the policies of comity and federalism to limit them in *Younger* v. *Harris*.

2. In *Mitchum* v. *Foster*, suit was brought against both the prosecutor and the judge who was trying the case, in an effort to obtain an injunction against a prosecution. Petitioners argue (Brief at 11) that the possibility of imprisonment or fines for contempt of an injunction makes the threat of injunction as "pernicious" as the threat of a money judgment. If so, this fact has not stopped this court from permitting injunctions against prosecutors. In *Mitchum* v. *Foster*, it appears to have been understood that an injunction to enjoin the prosecution was properly entered against either the judge or the prosecutor, without regard to any differences that might exist bewteen judicial immunity and prosecutorial immunity.

C. STRONG POLICY REASONS SUPPORT MAKING JUDGES AMENABLE TO INJUNCTIVE RELIEF IN A CASE SUCH AS THIS.

Because this Court has never held judicial immunity applicable to suits for injunctive or declaratory relief, any extension of judicial immunity to the facts of this case must be justified by the policies that underlie any grant of immunity. The policy reasons underlying judicial immunity were stated in *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967):

> [Judicial immunity] 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

(Citations omitted).

Under this rationale, the reason for immunity from an award of damages is clear. However, a suit for injunctive and declaratory relief alleging unconstitutional behavior on the part of a judge is in no important way different from an appeal, a petition for writ of habeas corpus, or a petition for a writ of mandamus or prohibition. Public policy does not discourage scrutiny of judicial actions; no judge worthy of the office is intimidated from doing what is right by the fear that he might be overturned on appeal.

This Court rejected the argument that public policy prohibits in-court scrutiny of judicial actions in *Dennis* v. *Sparks*, 449 U.S. 24, 30-31 (1980), in which alleged co-conspirators of a judge held to be immune from suit for damages asked this Court to extend that immunity to them as well. The co-conspirators had argued that public policy forbade even the challenge to the integrity of the judge and the judicial process involved in requiring the judge to testify as a witness.

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this survive initial challenge and go to trial, the judge's integrity and that of the judicial process may be at stake. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. . . .
>
> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. . . . In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is

> not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others. These concerns are not insubstantial, either for the judge or for the public, but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.

449 U.S. at 30-32.

A suit for injunctive relief differs from a suit against a co-conspirator in only two ways. First, the suit for injunctive relief names the judge as a party defendant. The suit, of course, is defended by the Attorney General at no cost to the judge. Second, the suit for injunctive relief involves the possible assessment of costs against the judge, as against any litigant, if the plaintiff prevails.

This burden, too, would be borne by the State, *see Hutto* v. *Finney*, 437 U.S. 678, 699 n.32, 700 (1978).

Amici Conference of Chief Justices and the State of Minnesota, *et al.*, suggest that the existence of alternative remedies make civil suits against judges unnecessary as a means of

controlling unconstitutional judicial conduct. Historically, "the existence of an alternative remedy was a factor behind judicial immunity at common law." Feinman & Cohen, *Suing Judges*, 31 S.C.L.Rev. 201, 259 n.336 (1980).

In most cases, other remedies will adequately check unconstitutional judicial conduct; usually appeals or petitions for writs of habeas corpus or writs of mandamus or prohibition *do* permit aggrieved plaintiffs to vindicate their rights without resort to suits against judges.

However, *Amici's* argument collapses when it is applied to the facts of this case. In this particular instance, no other procedure could have vindicated the rights of Richmond Allen and Jesse Nicholson. More importantly, no other procedure could have stopped the continuing practice of Magistrate Pulliam and others like her of incarcerating petty misdemeanants such as Respondents. None of the three procedures suggested by *Amici* could be effective.

1. *Appeal* — An appeal of the incarceration, given the short time (fourteen days) between arrest and release, would virtually always be dismissed as moot. Indeed, Magistrate Pulliam advanced mootness as one defense to the Complaint (App. 21).

2. *Habeas Corpus* — Review on habeas corpus is also unlikely ever to be possible because relief can only be granted if the petitioner is in custody, and the custody would almost surely be terminated before review could be had.

3. *Writ of Prohibition or Mandamus* — Under Virginia law, a writ of prohibition can only be used to prevent a judge from exceeding his jurisdiction,

and a writ of mandamus can only be used to require a judge to take jurisdiction. Neither situation existed in this case. A Petition for Writ of Prohibition or Mandamus cannot be used as a substitute for a petition for a writ of error. *King* v. *Hening*, 203 Va. 582 (1962).

Of course, none of these remedies is practical for someone who has been denied his right to counsel. Richmond Allen was caught in a "Catch-22."

He was incarcerated for a crime that carried no jail time. Under Virginia law, codifying this Court's decision in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), any defendant who is in custody having been charged with a crime *the punishment for which includes incarceration* must be promptly brought before a District Court judge for appointment of counsel and consideration of his bond. *Va. Code Ann.* §§19.2-157, -158. Because Allen was not charged with an offense for which he was entitled to the assistance of counsel, he was not afforded the first appearance required by Virginia law.[3] Had he been given his first

3. One who is illegally incarcerated for a non-incarcerable offense has at least as strong a right to counsel as one who is legally incarcerated. Count V of Allen's complaint alleged that he was denied his right to the assistance of counsel, in violation of the Sixth and Fourteen Amendments to the Constitution of the United States. Judge Bryan saw no need to address the merits of that claim. In reviewing the undecided claims, this Court must take the allegations as proven — an assumption made easier in this case because the facts underlying the claim were stipulated to for the Motion for Summary Judgment.

appearance "on the first day on which such court sits after the person is charged", *Va. Code Ann.* § 19.2-157, he would surely have been released immediately. But he was not given even the right to counsel, and he therefore was unable to take the other actions recommended by *Amici* to vindicate his rights.

More importantly, however, *Amici* misconstrue the nature of the public interest involved in having Magistrate Pulliam's practices enjoined. The interest is not in having Richmond Allen released, as it might be on a petition for writ of habeas corpus or on an appeal of his bond; he has already been released. The public benefit of having this case litigated is that *future* misdemeanants in Culpeper County will not have their rights violated in similar fashion. This was not a one-time violation; Petitioner stipulated that at least 34 persons were incarcerated for non-incarcerable offenses in a five-month period.

It seems unlikely that this long-standing practice was unknown to the other magistrates, or to the District Court Judge. Jesse Nicholson was incarcerated for public drunkenness by more than one magistrate (District Court Opinion, App. 25), and it seems unlikely that the District Court Judge would not have realized at least once that a Class 3 or Class 4 misdemeanant had been incarcerated. The only logical conclusion is that the local courts saw no constitutional deficiency in this practice.

Unless some action was taken, Magistrate Pulliam and her colleagues would have continued to violate the rights of misdemeanants who came before them.

Amici Conference and Chief Justices and the State of Minnesota, *et al.*, suggest that other procedures were available; in most cases the availability of another, preferrable remedy would be cause for dismissing the suit. However, there was no practical alternative remedy in the instant case, either to vindicate Richmond Allen's rights or to end the unconstitutional practice of Petitioner and her fellow magistrates.

The fact setting in this case is virtually unique. This Court could affirm the ruling of the Fourth Circuit without addressing the sweeping question presented by Petitioner by focusing on the facts of this case, emphasizing the short-term nature of the violation, the fact that the violation is a continuing practice but one that evades review, and the deprivation of rights to counsel.

To rule in favor of Respondents, this Court need not open every matter within the state judiciary to injunctions issued by federal courts; it is sufficient that the Court permit injunctions in injunctions in cases, such as this, in which no other rememdy exists.

III

Where Public Policy Favors Injunctive Relief, Public Policy Also Favors Awards Of Attorney's Fees To Make It Possible To Vindicate The Rights That The Injunction Would Protect.

The legislative history of 42 U.S.C. §1988 is clear that Congress intended that attorney's fees be available in every case in which relief, either by

injunction or by award of damages, may be granted under 42 U.S.C. §1983.

42 U.S.C. §1988 provides that the court may allow "a reasonable attorney's fee as part of the costs." Historically, costs are awarded to the prevailing party, even when only prospective relief is permitted.

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief. (An award of costs will almost invariably be incidental to an award of prospective relief, for costs are generally awarded only to prevailing parties, *see* Federal Rule of Civil Procedure 54(d), and only prospective relief can be successfully pursued by an individual in a suit against a State.)

Hutto v. *Finney*, 437 U.S. 678, 695 n.24 (1978). The Court cited *Fairmont Creamery Company* v. *Minnesota*, 275 U.S. 70 (1927), in which this Court rejected the State's claim that immunity precluded an award of costs against it. The Court reasoned that the power to make the award was supported by "the inherent authority of the court in the orderly administration of justice as between all parties litigant." *Id.* at 74. This notion applies with equal force to the lower courts. *Hutto* v. *Finney*, 437 U.S. at 696 n.26, citing cases.

Petitioner asserts that because the legislative history of 42 U.S.C. §1988 does not specifically

refer to abrogating judicial immunity, that section cannot authorize an award of attorney's fees against a judge. This argument cannot prevail, for two reasons. First, this Court held in *Hutto* v. *Finney* that it was not necessary for Congress to expressly abrogate an immunity to costs only, since costs have always been taxable against the losing party. Second, this Court has often upheld injunctions awarded against judges, and this Court cannot assume that the legislature contemplated in 1976 an expansion of judicial immunity that had no support in the law at that time.

If states can be required to pay attorney's fees as costs in a case in which prospective relief is awarded, notwithstanding immunity from suit for money damages, the same principle should apply to judges.

This policy that attorney's fees should be available in any case in which prospective relief may be granted is based on the very strong statements of policy in the legislative history of 42 U.S.C. §1988. Drawing on the experience under civil rights statutes such as the Voting Rights Act and the Civil Rights Act of 1964, the Senate noted that:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> . . . If private citizens are to be able to assert their civil rights, and if those who violate the

> Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court.

S.Rep.No. 94-1011, 94th Cong., 2d Sess. at 2-3, *reprinted in* 1976 U.S.Code Cong. and Ad. News 5908, 5909-10.

Congress felt very strongly that the award of attorney's fees was necessary, particularly in cases where no damages could be awarded, to encourage private enforcement by "private attorneys general." The Senate Report relied on *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), which awarded attorney's fees under Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(a), which provided for injunctive relief, but did not permit the award of damages. In this country, the award of damages often has served the purpose of awarding to the successful plaintiff enough money to be able to pay an attorney's fee, thereby making it possible for the prevailing party to recover his costs. Where no damages can be awarded, but where substantial constitutional rights are at stake, it is all the more important that attorney's fees be awarded to the "private attorneys general" who vindicate federal constitutional rights in our courts. As the Senate Report noted:

> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose . . . without counsel fees the grant of Federal jurisdiction is but an empty gesture.

S.Rep.No. 94-1011, *supra*, at 3, *citing Hall* v. *Cole*, 412 U.S. 1, 13 (1973) (*quoting* 462 F.2d 777, 780-81 (2nd Cir. 1972)).

The Senate Report emphasized that one of the purposes in passing 42 U.S.C. §1988 was to encourage civil rights litigation:

> If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S.Rep.No. 94-1011, *supra*, at 6.

The particular interest of *Amicus* National Association of Criminal Defense Lawyers is that this Court not cut back on the doctrine of the "private attorney general". The NACDL is dedicated to the vindication of the constitutional rights of all criminal defendants, and to the prevention of future violations of those rights. The record is clear in this case that the rights of at least 34 defendants were violated in a five-month period in only one county of Virginia. The record does not disclose, and this Court may only wonder, how many hundreds of indigent defendants have been incarcerated by magistrates in Virginia for non-incarcerable offenses. As was argued above in Argument II, the only other possible remedies are all inadequate. Had it not been for the prospect of attorney's fees awardable under 42 U.S.C. §1988, it is entirely likely that this practice would have

continued, and that violations of the rights of misdemeanants in Virginia would have continued.[4]

The NACDL has no financial stake in the outcome of this appeal. However, *Amicus* has a strong interest in this Court's continued support for private attorneys general, believing that the award of attorney's fees is likely to be the only enticement to most members of the private bar to see that the rights of the poor are asserted.

In rural Virginia, men such as Richmond Allen and Jesse Nicholson have few advocates. They are poor; they were incarcerated because of their poverty. They did not know their rights or how to assert them, nor could they hire a lawyer themselves, either to get them out of jail in the first place or to have the practice of incarcerating misdemeanants such as themselves declared unconstitutional. They are not men of any political influence; their access to those in positions of power is negligible. The "public attorney general" — the Attorney General of Virginia — not only did not support Richmond Allen, but vigorously[5] opposed the Motion for Summary Judgement on the merits, suggesting that incarceration for a non-incarcerable offense was permitted under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

4. Effective July 1, 1981, the Virginia General Assembly amended *Va. Code Ann.* §19.2-74 to make it even more clear that persons such as Richmond Allen and Jessee Nicholson cannot be incarcerated pending trial. However, given Magistrate Pulliam's apparent belief in her right to incarcerate the poor, it would not be safe to assume that she would have followed the new statutory direction without some instruction from a federal court.

Richmond Allen and Jesse Nicholson had only the protection afforded by the Bill of Rights to the United States Constitution, to which the courts in Culpeper County were oblivious. Only by bringing this action in federal court have Richmond Allen and Jesse Nicholson received the benefit of the Bill of Rights. They did not seek, and indeed could not have received, compensation for their illegal incarceration. They merely sought to stop this unconstitutional practice.

Amicus NACDL prays this Court to give meaning to the concept of the private attorney general by allowing attorney's fees in this case. As argued above, the number of cases in which prospective relief against a judge will be permissible are few and far between; most cases are appropriate for other, less intrusive forms of relief. However, where relief should be afforded, attorney's fees should be available, also. Congress intended, in 42 U.S.C. §1988, to make the availability of attorney's fees coextensive with the

5. Petitioner has complained that the attorney's fees of $7,308.00 were excessive. Judge Bryan noted that the legal support for the Attorney General's position on the constitutional issues was "quite frankly, anemic" (App. 26). Given the indefensibility of the Attorney General's position on the merits, it would seem that the preferred course for the Attorney General would have been to acknowledge error (since the request was only for prospective relief, there could be no liability for damages), terminating the litigation promptly and with little cost to either side. However, because the Attorney General sought to defend its essentially indefensible position, the costs and expenses incurred by Respondent and counsel mounted quickly.

availability of any form of relief, retroactive or prospective. This Court should give meaning to the legislative intent by upholding the district court's award of fees in this case.

CONCLUSION

Congress passed 42 U.S.C. §1988 to encourage citizens to vindicate their recognizing that the biggest obstacle was often finding counsel:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court.

S.Rep.No. 94-1011, 94th Cong., 2d Sess. at 2-3, *reprinted in* 1976 U.S.Code Cong. and Ad. News 5908, 5909-10. Quoting from this Court's decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), the Senate stated that the purpose of 42 U.S.C. §1988 was to fund "private attorneys general" to bring private enforcement actions, lest "our civil rights laws . . . become mere hollow pronouncements which the average citizen cannot enforce." S.Rep.No. 94-1011, *supra*, at 6. Because prospective relief was necessary in this case to halt a continuing course of unconstitutional conduct, the public policy behind 42 U.S.C. §1988 justifies an award of attorney's fees.

Public policy requires that, at least in this very narrow case, judicial immunity not be extended to bar suits for prospective injunctive and declaratory relief. To bar such injunctive relief would render uncorrectable an unconstitutional pattern and practice such as that of Petitioner in this case. This Court is interested both in the orderly administration of justice and in the vindication of constitutional rights, particularly for those who cannot vindicate those rights because they have also been denied the assistance of counsel. Both goals would be furthered by allowing attorney's fees against the Petitioner in this case.

Accordingly, the judgment of the Court of Appeals below was correct, and must be affirmed.

Respectfully submitted,

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Amicus Curiae

By:

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Amicus Brief

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No. 82-1432

IN THE

Supreme Court of the United States

October Term, 1982

GLADYS PULLIAM,
Magistrate for the County of Culpepper, Virginia,
Petitioner,

v.

RICHARD R. ALLEN and JESSE W. NICHOLSON,
Respondents.

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INTEREST OF AMICI CURIAE

The State of Minnesota, its Supreme Court, and 47 other commonwealths and states, through their respective Attorneys General, offer this brief as *amici curiae* in support of the position advanced by petitioner Gladys Pulliam, Magistrate for the County of Culpepper, Virginia. If the construction of 42 U.S.C. § 1988 adopted by the Court of Appeals in this action is upheld, the judges of the courts in these jurisdictions will become potentially liable for substantial awards of attorney's fees in actions brought under 42 U.S.C. § 1983. In virtually all of the states, the Attorneys General, as the chief legal officers of those states, have responsibility for defending actions against judges. In all of the states, the Attorneys General are legal counsel for the governments which will likely bear the financial burden of those awards.

Contrary to this Court's prediction that cases entailing the assessment of attorney's fees against judges will be rare,[1] there have been numerous cases potentially raising that question in just the last three years. Currently, at least fourteen cases are still pending in which an award of attorney's fees against judges is in issue. For these reasons, *amici* have a substantial and continuing interest in the outcome of this case.

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[1] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 735 n.13 (1980).

SUMMARY OF ARGUMENT

From the earliest days of the common law, judges have been immune from civil liability for their judicial acts. The immunity exists as a barrier to the destructive effect which harassing suits and potential liability would have on the judiciary's ability to remain an independent and fearlessly principled institution. The same concerns require that immunity also bar the award of attorney's fees against judges under 42 U.S.C. § 1988.

The intention to provide for attorney's fees awards against judges should not lightly be imputed to Congress. Neither on its face nor in its legislative history does section 1988 manifest an intention to abrogate judicial immunity. Thus, regardless of the nature of the relief sought in an action against judges, attorney's fee awards should not be permitted.

While this Court need not necessarily decide whether judicial immunity extends to actions seeking prospective relief as well as those seeking damages, the Court must address that issue if it concludes that attorney's fee awards are barred only when the underlying relief sought by a plaintiff is also barred. If the issue is reached, it should be resolved in favor of judicial immunity from prospective relief for acts within one's judicial capacity. The policies which give rise to absolute legislative immunity and judicial immunity from civil damages also support judicial immunity from declaratory and injunctive relief.

ARGUMENT

I. JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AGAINST JUDGES UNDER 42 U.S.C. § 1988.

This case presents the important and unresolved question of whether attorney's fees under 42 U.S.C. § 1988 may be awarded against a judge acting in her judicial capacity. In approving such an award in this case, the Court of Appeals for the Fourth Circuit misapprehended the reach of section 1988. At the heart of the court's error lay, first, its failure to acknowledge the importance of those policies which underlie the doctrine of judicial immunity and, second, its unwarranted conclusion that Congress specifically intended that 42 U.S.C. § 1988 limit the scope of that well-established doctrine.

A. Development And Purpose Of The Doctrine Of Judicial Immunity.

As this Court has often observed, the absolute immunity of judges for acts committed within their jurisdiction has roots extending to the earliest days of the common law; few doctrines are more solidly established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 418, 422, n.20 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The doctrine's adoption and development in this country rests upon the important purpose of preserving the judiciary as an institution which is independent and fearlessly principled.[2] From this Court's earliest deci-

[2] This function of judicial immunity is equally well reflected in English decisions upon which this Court first relied when it enunciated the doctrine. *See, e.g.*, Taaffe v. Downes, 13 Eng. Rep. 15 (C.P. Ireland 1813); Randall v. Bringham, 74 U.S. (7 Wall.) 523, 533 (1868).

sions concerning judicial immunity, *e.g.*, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), to its pronouncement in *Dennis v. Sparks*, 449 U.S. 24 (1980), the purpose of immunizing judges has been clearly stated: "the point . . . is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979). As stated in *Sparks:*

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.

449 U.S. at 31 (citations omitted).

At the heart of judicial immunity, then, lies the recognition of what is required to preserve the judiciary as an institution whose legitimacy rests, above all else, on the power of its reason: an independent and principled judiciary must be free from the intimidating effect that potential monetary liability imposes. This prescription offers no basis for a distinction, such as that made by the Court of Appeals, between liability for civil damages and that for attorney's fees.

The threat of an award for attorney's fees would be no less disconcerting to judges than the threat of an equally large damage award. Either would inescapably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950). Those on the bench are very much aware of the

recent proliferation of suits brought under section 1983. Indeed, while not all states have maintained detailed records of every such case, estimates from the states *amici* indicate that scores are filed every year naming judges as defendants. Many such cases are still pending and may ultimately require a determination of whether attorney's fees should be awarded against the judge.[3] Judges are equally aware that attorney's fee awards of $50,000 and more are becoming commonplace.

The intimidating effect of this potential liability, much as the effect of potential damage liability, would lie not necessarily in the prospect of an award against the judge *personally*. Damages, were they recoverable, would likely be paid by the state under indemnification statutes effective in many, but not all, states.[4] States having such statutes are also likely to be the ultimate source of funds to pay attorney's fees as well. Under § 1988 the awarded fees are to be collected "either directly from the official, in his official capacity, from funds

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[3] Estimates made by *amici* indicate that judges have been named defendants in suits brought under 42 U.S.C. § 1983 well over 200 times since 1980. In at least 14 such cases which are still pending, the issue of attorney's fees is present.

[4] *See, e.g.*, Cal. Gov't. Code § 825 (West); Colo. Rev. Stat. § 24-10-110 (1982); Del. Code Ann. tit. 10, § 4002 (1978); Idaho Code § 6-903; Ill. Rev. Stat. ch. 127 § 1302 (1982); Iowa Code ch. 25A (1983); Md. Ann. Code of 1957, Art. 78A, § 16C; Mont. Laws. ch. 530 (1983); N.H. Rev. Stat. Ann. ch. 99D (Supp. 1981); N.J. Stat. Ann. § 59:10-1 (West 1982); N.D. Cent. Code § 34-02-01; Ohio Rev. Code § 9.87 (Supp. 1982); Tenn. Code Ann. § 9-8-220; Tex. Rev. Civ. Stat. Ann. art. 6252-26 (Vernon 1982); Utah Code Ann. § 63-48-1 through 7 (2d Repl. Vol. 1977); Vt. Stat. Ann. tit. 3, §1101-1103; Wis. Stat. §§ 893.82, 895.46 (1981); Wyo. Stat. § 1-39-104(b) (1977, 1982 Cum. Supp.). However, numerous states, such as South Carolina, Oklahoma and Hawaii, do not have indemnification provisions. Others such as Pennsylvania and Michigan have provisions which do not apply to judges. *See e.g.*, Mich. Comp. Laws Ann. § 691.1408. In these states, potential personal liability for judges would be particularly intimidating.

of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 1011, 94th Cong., 2d Sess., 5 *reprinted in* 1976 U.S. Code Cong. & Admin. News (1976) 5908, 5913. Yet, personal liability is not always impossible, particularly in those states which have no existing indemnification provisions for judges. Further, any suggestion that judges would be unaffected by awards against the funds of their offices does scant justice to their sense of public responsibility. The prospect of large, if not crippling, fee awards against the public funds with which they are entrusted would be profoundly disturbing to all conscientious jurists. In addition, judges do not typically have at their disposal vast budgets capable of absorbing sizeable and unforeseen fee awards. Instead, the effect of imposing such awards would be to send state judges, hat in hand, to legislatures for a special appropriation to pay each award. Only the most sanguine observer would insist that the risk of liability for fees, with its attendant consequences, would not influence judicial decision-making.

The effect of a fee award on an official's decision-making has already been acknowledged in this Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978).[5] There, this Court described attorney's fees as one of the "financial penalties" which may be used as "effective enforcement weapons" to elicit compliance with an injunction. *Id.*, 437 U.S. at 690. The

[5] Hutto v. Finney held that the Eleventh Amendment does not bar an award of attorney's fees against a State in conjunction with the issuance of declaratory and injunctive relief. The absence of such an Eleventh Amendment bar, however, offers no guidance in determining whether, as against judicial officers, there remains a bar of judicial immunity. The policies which give rise to judicial

Court noted that "the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation." *Id.*, 437 U.S. at 695, n.24.

Because this "weapon" can indeed shape the actions of officials, even when fees are awarded against public funds, it would be disingenuous to assert that the prospect of such costs will not have an intimidating effect. It is precisely this effect that the doctrine of judicial immunity was intended to counter. Thus, that doctrine must stand as a barrier to the award of attorney's fees against judges.

B. Congress Did Not Intend Section 1988 To Abrogate Judicial Immunity.

The Court of Appeals concluded that judicial immunity did not bar an award of attorney's fees in this case because Congress intended section 1988 to allow such awards. The court reasoned that judicial immunity could be abrogated by legislative action and that section 1988 constituted that action. *Allen v. Burke*, 690 F.2d 376, 379 (1982). While it is true that Congress may act to abolish the immunity of judges from attorney's fee awards, it by no means follows that Congress did so when it adopted section 1988.

Judicial immunity is so deeply rooted in the common law that, had Congress wished to abolish it, it "would have specifically so provided . . . ." *Pierson v. Ray*, 386 U.S. at 555.[6] In that case, this Court concluded that judicial immunity was not abolished by Congress' act making "every person" acting under color of state law liable if he deprives another of his civil rights. 42 U.S.C. § 1983. If so sweeping a reference as "every person" were insufficient indication of Congress' in-

[6] *Cf.* Tenney v. Brandhove, 341 U.S. 367 (1951).

tent to abrogate judicial immunity, the meager consideration given that doctrine by Congress in adopting section 1988 must be so as well.

Section 1988 was a response to the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), holding that exceptions to the American Rule barring fee shifting must be specifically provided by Congress. The reports and debates on the measure indicate that it was "narrowly drawn legislation" intended to "restore to the court authority which they had exercised for years under the private attorneys general concept." 122 Cong. Rec. H31525-26 (daily ed. October 1, 1976) (statement of Rep. Fish). *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908-13. Prior to *Alyeska, supra*, lower courts had "erroneously" applied the theory to award fees to private attorneys general. *Alyeska, supra*, 421 U.S. at 270, n.46. Yet that theory, so far as *amici* are aware, never provided the basis for an award of attorney's fees against judges. Thus, congressional action intended to restore to the courts the power they had earlier exercised hardly constitutes an express intention that judges become newly liable for attorney's fee awards.

In this case, the Court of Appeals inferred such an intention from a paragraph in the House Report stating that counsel fees are to be available "in some cases, [where] immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H. Rep. No. 1558, 94th Cong., 2d Sess., 9 (1976). *Allen v. Burke, supra*, 690 F.2d at 379. The Report contains no express reference to judicial immunity, but the Court of Appeals inferred an intent to abrogate that immunity from the general reference to "immunity doctrines" and from the Report's citation of *Pierson v. Ray*. *Allen v. Burke*, 690 F.2d at 379.

Ironically, it is *Pierson* which established that an intent to abolish judicial immunity must be expressly stated. Surely, if Congress had intended such an abrogation, the citation to *Pierson* is evidence of its awareness of the need to do so explicitly. Because *Pierson* involved not only a judge, but also police officers, and established the "special defenses" of good faith and probable cause for police officers, the House Committee's citation to *Pierson* is at most ambiguous and can equally be understood as referring to these "special defenses." Where, as here, the immunity in question is based upon important policies long recognized in the law, and where sensitive issues of federalism are implicated, this Court should not so lightly infer an abrogation of immunity.[7]

II. JUDICIAL IMMUNITY SHOULD BAR PROSPECTIVE RELIEF AGAINST ACTS TAKEN IN A JUDGE'S JUDICIAL CAPACITY.

In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732-33 (1980), this Court left unresolved whether judicial immunity bars prospective relief against judges for acts taken in their judicial capacity. In this case as well, the Court need not reach the issue unless it first concludes that the doctrine of judicial immunity bars a fee award in this case *only* if the doctrine also bars injunctive relief. If that position, more narrow than the one advanced here, is adopted by the Court, it will become necessary to finally determine whether judicial

[7] Cf. Hutto v. Finney, *supra*, 437 U.S. at 706 (Powell, J. concurring in part and dissenting in part). *See also* Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv.L.Rev. 682, 695 (1976).

immunity does bar prospective relief and, for that reason, bars the award of attorney's fees in this case.[8]

If the Court reaches the issue, it should resolve it by acknowledging that those policies which underlie judicial immunity in its present from, and which have contributed to the development of absolute immunity for legislators, compel the conclusion that judicial immunity from civil suits must also include suits for injunctive relief. The *Consumers Union* decision reestablished the principle that public officials who act in legislative capacities are absolutely immune to suits for damages *and* declaratory and injunctive relief. In this case, compelling reasons exist to give judicial immunity the same breadth.

The rationale of this Court's judicial immunity decisions supports the view that judicial immunity, like legislative immunity, extends to all civil suits, regardless of the nature of the relief sought. *See, e.g., Conover v. Montemuro*, 477 F.2d 1073, 1104 (3d Cir. 1973) (Aldisert, J., concurring); *Zimmerman v. Spears*, 428 F. Supp. 759, 761 (W.D. Tex. 1977); *Mirin v. Justices of Supreme Court of Nevada*, 415 F. Supp. 1178 (D. Nev. 1976); *Atchley v. Greenhill*, 373 F. Supp. 512, 514, 515 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975) *cert. denied*, 424 U.S. 1915 (1976); *Smallwood v. United States*, 358 F. Supp. 398, 403 (E.D. Mo. 1973), *aff'd*, 486 F.2d 1407 (8th Cir. 1973); *Mackay v. Nesbitt*, 285 F. Supp. 498, 502, 503 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

In case after case, this Court has emphasized that judicial immunity is necessary to protect judges against the harassing and intimidating influence of being compelled to defend themselves in vexatious civil actions. This burden inheres in any

[8] *See Consumers Union, supra*, 446 U.S. at 739.

civil action, regardless of the nature of the relief sought or the ultimate outcome of the case. Judicial immunity reflects the conviction that a judge:

> should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, supra, 386 U.S. at 554.

Similarly, in *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 347, this Court stated that "[l]iability to answer to everyone who might feel himself aggrieved by the action of the judge . . . would destory that independence without which no judiciary can be either respectable or useful." Judicial immunity is thus a response to concern that:

> harassment by unfounded litigation would cause a deflection of the [judge's] energies from his public duties, and the possibility that he sould shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler v. Pachtman, supra, 424 U.S. at 422, 423 (referring to prosecutors, and to the common concerns justifying the immunity of prosecutors, judges and grant jurors).[9] This danger

[9] While the Court has said that prosecutors are the "natural targets for § 1983 injunctive suits" so that putative plaintiffs need not await trial to assert federal constitutional claims, *Consumers Union, supra*, 466 U.S. at 736-37, no similar reason exists to make judges such "targets." By its very nature, an injunction against prosecution works on those possessing authority to bring a complaint before a tribunal but not on the legislature which adopted the challenged law nor the court which is to interpret and apply it. Ex parte Young, 209 U.S. 123 (1908); *cf.* Gerstein v. Pugh, 420 U.S. 103

is completely independent of the nature of the civil action, or its final disposition. Even if a judge is certain of ultimate vindication, and thus is free from personal financial consequences, the risk of having to *defend* a suit may nevertheless be a substantial deterrent to fearless action. *Cf. Imbler v. Pachtman, supra*, 424 U.S. at 438, n.4 (White, J., concurring).

In this respect, judges occupy positions precisely analogous to those of legislators. To preserve legislative independence, legislators must be protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). State legislators[10] and members of Congress are thus immune from all civil actions, regardless of the relief sought, because " 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' " *Supreme Court of Virigina v. Consumers Union, supra*, 446 U.S. at 733, *quoting Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Even if the relief sought is wholly prospective, private civil actions may be used to delay and disrupt the legislative function. *East-*

(1975) (Issue not presented whether judicial officers as well as prosecutors may be enjoined from proceeding on prosecutor's information rather than indictment.) Even in cases, such as this, challenging pre-trial detention, there is no reason to name judges as respondents. Traditionally, habeas corpus is used to challenge such detention and the party addressed by the writ is the person having custody of the petitioner, not the judge who set or denied bail. *See, e.g.*, Mastrian v. Hedman, 326 F.2d 708 (8th Cir.) *cert. denied*, 376 U.S. 965 (1964).

[10] The fact that state legislators are also absolutely immune under section 1983 belies any argument that legislative immunity rests solely on the speech and debate clause of U.S. Const. Art. I, § 6. Were that clause necessary to legislative immunity, only members of Congress would fall within its scope. *See Consumers Union, supra*, 446 U.S. at 730; Tenney v. Brandhove, 341 U.S. 367 (1951).

land v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

Indeed, the potential for distraction, harassment and disruption may be greater in the judicial sphere. Judicial acts are almost always performed in an adversarial setting. It is inevitable that in such circumstances a judge's decision will be adverse to at least one of the litigants. The opportunities for federal civil rights actions against judges are, therefore, substantial.

The case for immunity from prospective relief is stronger in the judicial than in the legislative sphere for another reason. Immunity in general is justified in part by the existence of alternative forums and methods for vindication of individual rights. Judges, like legislators, are subject to impeachment. In many states, they are also accountable at elections. Further, judges are subject to criminal punishment for any willful deprivation of constitutional rights. 18 U.S.C. § 242; *Imbler v. Pachtman, supra*, 424 U.S. at 429. Moreover, "the law has provided for private parties numerous remedies" for the correction of judicial errors. *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 354. Litigants are not only afforded an initial opportunity for hearing, but also an opportunity to invoke the judge's remedial powers in post-trial proceedings; to pursue an appeal; in criminal cases, to invoke state and federal post-conviction remedies; and, in proper cases, to obtain extraordinary writs. In many instances, the desired relief could also be attained by an action against other defendants, such as enforcement officers, who are not shielded by judicial immunity. *See, e.g., Supreme Court of Virginia v. Consumers Union, supra*; see also n.9, *supra*.

This wide array of alternative forums makes absolute judicial immunity at least as defensible as the absolute immunity

afforded legislators. To authorize further review of a judge's decision in section 1983 actions would in many cases necessitate a virtual retrial of the original action in a new forum, before a new judge. Such a retrial would defeat one of the fundamental purposes of judicial immunity, which is to prevent "the manifest injustice of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment of others." Prosser, *Laws of Torts* § 132 at 988 (Hornbook Series, 4th Ed. 1971).[11]

In addition to the burden of defending civil suits, the remedy of injunctive relief may itself have a chilling influence on judicial independence. Inherent in an injunction are the traditional sanctions for its enforcement, including imprisonment and fines for contempt. *Conover v. Montemuro, supra,* (Aldisert, J., concurring). These sanctions by definition are meant to alter the behavior of the parties against whom they are directed and they are used both to punish noncompliance and to compensate prevailing litigants. *Cf. Hutto v. Finney, supra.* Such sanctions thus hold the same potential for inhibiting forceful decision-making as do damage remedies.

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[11] Further support for this view can be found in this Court's ruling that state legislators are insulated from suits for prospective relief. Supreme Court of Virginia v. Consumers Union, *supra,* 446 U.S. at 732. The ruling was based in part on the fact that the Court's prior pronouncements on the subject had described legislators as immune from "civil liability" without distinguishing between damage actions and injunctive actions. The same observation may be made here. This Court has often described judges as immune from "civil liability," without distinguishing between damage and injunctive "actions." *See, e.g.,* Bradley v. Fisher, supra, 80 U.S. (13 Wall.) at 347 (citing the "exemption of judges from civil liability"). In Pierson v. Ray, *supra,* 386 U.S. at 555, n.5, for example, the Court stated flatly that "judicial immunity is a defense to an action under § 1983." As in the Consumers Union case, the unqualified language of this Court's prior decisions supports an expansive reading of the scope of judicial immunity.

There exists no valid reason to create an artificial distinction between judicial and legislative immunities. Consequently, there is no valid reason to limit judicial immunity only to actions seeking damages. While this case may not require that the Court finally determine the precise contours of judicial immunity, it does provide the Court an opportunity to prevent the establishment of an unjustified limitation on that immunity.

CONCLUSION

The immunity of judges from civil liability for their decisions is essential to the integrity and independence of the judiciary. The policies which give rise to that immunity are as applicable to an allowance of costs as they are to an allowance of damages and must preclude an award of attorney's fees under 42 U.S.C. § 1988. *Amici curiae* join the Petitioners in urging the Court to reverse the decision of the Court of Appeals.

June, 1983.

Respectfully submitted,

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Docket Sheet

No. 82-1432-CFX Title: Gladys Pulliam, Magistrate for the County of
Status: GRANTED Culpeper, Virginia, Petitioner
v.
Richmond R. Allen and Jesse W. Nicholson

Docketed:
February 25, 1983 Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Broaddus,William G.

Counsel for respondent: Wyatt,Deborah C.

Entry	Date	Note	Proceedings and Orders
1	Feb 25 1983	G	Petition for writ of certiorari filed.
2	Mar 25 1983	G	Motion of respondents for leave to proceed in forma pauperis filed.
3	Mar 25 1983		Brief of respondents Richmond R. Allen, et al. in opposition filed.
4	Mar 30 1983		DISTRIBUTED. April 15, 1983
5	Mar 30 1983	X	Brief amicus curiae of State of Minnesota, et al. filed.
7	Apr 18 1983		REDISTRIBUTED. April 22, 1983
8	Apr 25 1983		Motion of respondents for leave to proceed in forma pauperis GRANTED.
9	Apr 25 1983		Petition GRANTED.
			**********
10	May 19 1983		Record filed.
11	May 19 1983		Certified original record on appeal & C.A. proceedings, 2 volumes, received.
12	Jun 9 1983		Joint appendix filed.
13	Jun 9 1983		Brief of petitioner Gladys Pulliam, etc. filed.
14	Jun 8 1983		Brief amicus curiae of Abraham J. Gafni filed.
15	Jun 9 1983		Brief amicus curiae of Conference of Chief Justices filed.
16	Jun 11 1983	G	Motion of American Bar Association for leave to file a brief as amicus curiae filed.
17	Jun 11 1983		Brief amicus curiae of State of Minnesota, et al. filed.
18	Jun 8 1983		Brief amicus curiae of Lawrence H. Cooke filed.
19	Jun 20 1983		Motion of American Bar Association for leave to file a brief as amicus curiae GRANTED.
20	Jun 27 1983	D	Motion of Honorable Abraham J. Gafni for leave to participate in oral argument as amicus curiae filed.
22	Jul 5 1983		Order extending time to file brief of respondent on the merits until July 25, 1983.
23	Jul 25 1983		Brief of respondents Richmond R. Allen, et al. filed.
24	Jul 26 1983		Brief amicus curiae of ACLU, et al. filed.
25	Jul 28 1983		Brief amicus curiae of The National Association of Criminal Defense Lawyers filed.
26	Aug 4 1983		CIRCULATED.
27	Aug 23 1983		Motion of Honorable Abraham J. Gafni for leave to participate in oral argument as amicus curiae DENIED.
28	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 2, 1983. (4th case) (1 hour)
29	Oct 24 1983	X	Reply brief of petitioner Gladys Pulliam, etc. filed.
30	Nov 2 1983		ARGUED.